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Report of the Working Group on Arbitrary Detention

Chair-Rapporteur: Mads Andenas

Summary

In 2014 the Working Group on Arbitrary Detention, under its regular procedure, adopted 57 opinions concerning the detention of 422 persons in 30 countries. It also transmitted 136 urgent appeals to 48 Governments concerning 435 individuals. States informed the Working Group that they had taken measures to remedy the situation of detainees. In some cases, detainees were released; in other cases, the Working Group was assured that the detainees concerned would be guaranteed a fair trial. The Working Group is grateful to those Governments that heeded its appeals and that took steps to provide it with the requested information on the situation of detainees.

The Working Group engaged in continuous dialogue with countries that it visited, in particular in respect of its recommendations. Information on the implementation of recommendations made by the Working Group was received from the Government of El Salvador. In 2014, the Working Group visited New Zealand and undertook follow-up visits to Germany and Italy. The reports on these visits are contained in addenda to the present report (A/HRC/30/36/Add.2, 4 and 3, respectively).

Pursuant to Human Rights Council resolution 20/16, the Working Group is also submitting to the Council a report containing the draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court (A/HRC/30/37), which were adopted by the Working Group at its seventy-second session. The draft basic principles and guidelines are aimed at assisting Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty. The Working Group also prepared a report on national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court (A/HRC/27/47).

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In the present report, the Working Group analyses issues relating to detention in the context of drug control and to peaceful protests and arbitrary detention, and emphasizes the need of remedies for arbitrary detention as an imperative norm of international human rights law. In most cases, including where release is not a remedy, the individual has a right to compensation. Domestic law cannot erect barriers that would limit this right in the form of immunities, jurisdictional limitation, procedural hurdles or defences based on an Act of State doctrine.

In its recommendations the Working Group requests States to enforce the protection of every person's right to liberty under customary international law and to ensure that the available guarantees and safeguards are extended to cover all forms of deprivation of liberty, that persons are not held in pretrial detention for periods longer than those prescribed by law, and that such persons are promptly brought before a judge.

The Working Group recommends that the Human Rights Council change the title of the Working Group to the Working Group on Arbitrary Deprivation of Liberty and that it request the Working Group to prepare an in-depth analysis of detention as a consequence of international and national drug policies during 2016 and a report on the principles of legality, proportionality, necessity and appropriateness applicable to avoid arbitrary detention, during 2017.

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I. Introduction

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42 and entrusted with the investigation of instances of alleged arbitrary deprivation of liberty, according to the standards set forth in the Universal Declaration of Human Rights and the relevant international instruments accepted by the States concerned. The mandate of the Working Group was clarified and extended by the Commission in its resolution 1997/50 to cover the issue of administrative custody of asylum seekers and immigrants. At its sixth session, the Human Rights Council assessed and confirmed the mandate of the Working Group (Council resolution 6/4). On 26 September 2013, in its resolution 24/7, the Council extended the Working Group's mandate for a further three-year period.

2. During the period 1 January–31 May 2014, the Working Group was composed of Shaheen Sardar Ali (Pakistan), Mads Andenas (Norway), Roberto Garretón (Chile), El Hadji Malick Sow (Senegal) and Vladimir Tochilovsky (Ukraine). On 1 June 2014, Sètondji Roland Jean-Baptiste Adjovi (Benin) and José Antonio Guevara Bermúdez (Mexico) started their functions as members of the Working Group, replacing Mr. Sow and Mr. Garretón, respectively. On 1 August 2014, Seong-Phil Hong (Republic of Korea) started his functions as a member of the Working Group, replacing Ms. Ali.

3. During 2014, Mr. Andenas was the Chair-Rapporteur of the Working Group and Vladimir Tochilovsky its Vice-Chair. At the seventy-second session of the Working Group, Mr. Hong was elected as Chair-Rapporteur, Mr. Guevara Bermúdez as First Vice-Chair and Mr. Adjovi as Second Vice-Chair.

II. Activities of the Working Group in 2014

4. During the period 1 January to 31 December 2014, the Working Group held its sixty-ninth, seventieth and seventy-first sessions. It undertook an official mission to New Zealand, from 24 March to 7 April 2014, and two follow-up visits, one to Germany, from 12 to 14 November 2014 and one to Italy, from 7 to 9 July 2014 (see A/HRC/30/36/Add.2, 4 and 3, respectively).

5. On 24 March 2014, the Government of Nauru cancelled the visit of the Working Group scheduled to take place from 14 to 19 April 2014, owing to "unforeseen circumstances". The Government has not yet accepted the new visit dates proposed by the Working Group.

6. Pursuant to Human Rights Council resolution 20/16, the Working Group adopted at its seventy-second session the draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court. The draft basic principles and guidelines are aimed at assisting Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty, in compliance with international human rights law.

7. The Working Group submitted to the Human Rights Council at its twenty-seventh session a report in which it compiled international, regional and national legal frameworks on the right to challenge the lawfulness of detention before court (A/HRC/27/47). The report was based largely on the responses submitted by a wide range of stakeholders to a questionnaire sent by the Working Group, in which it requested details on the treatment of the right in the respective legal frameworks.

8. The Working Group is submitting to the Human Rights Council at its thirtieth session a separate report containing the draft principles and guidelines (A/HRC/30/37). Mr. Andenas served as the rapporteur for the draft basic principles and guidelines.

9. On 1 and 2 September 2014, the Working Group convened a global consultation in Geneva to bring together thematic and regional experts to elaborate on the scope and content of the right to court review of detention, and to allow stakeholders to contribute to the development of the draft basic principles and guidelines. Fifteen regional experts delivered presentations. Government representatives, bodies and agencies of the United Nations system, international and regional organizations, national human rights institutions, civil society organizations and academia participated actively in the event. The Working Group used the outcome of the consultation to revise its preliminary version of the draft basic principles and guidelines.

10. The Working Group continued to update its database (www.unwgaddatabase.org), which was launched in 2011 to facilitate free and public access to the Working Group's opinions on individual cases of detention. The database contains over 600 opinions, available in English, French and Spanish, that have been adopted since the establishment of the Working Group in 1991. The database serves as a practical research tool for victims, lawyers, academics and others preparing cases for submission to the Working Group.

11. At its seventieth session the Working Group decided to establish a task force, composed of Mr. Tochilovsky, Mr. Adjovi and the secretary of the Working Group, to work intersessionally to put forward suggestions for improvements to the Working Group's procedures and working methods. The task force identified a need to improve communication, both between the Working Group and the parties involved as well as within the Working Group. In order to improve the transparency and availability of information, the Working Group established an internal extranet page, in coordination with the Office of the United Nations High Commissioner for Human Rights (OHCHR), and updated the Working Group's public website. At its seventy-first session, the Working Group decided to amend its standard questionnaire for submitting cases in accordance with the regular communications procedure, in order to include questions related to due process and fair trial.

12. Mr. Tochilovsky represented the Working Group at a conference entitled "Challenges to security and human rights in the Arab region", which took place in Doha on 5 and 6 November 2014. Mr. Hong represented the Working Group at an expert consultation on the administration of justice through military tribunals, held in Geneva on 24 November 2014.

A. Handling of communications addressed to the Working Group during 2014

1. Communications transmitted to Governments

13. At its sixty-ninth, seventieth and seventy-first sessions, the Working Group adopted a total of 57 opinions concerning more than 422 persons in 30 countries (see the table below).

2. Opinions of the Working Group

14. Pursuant to its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group, in addressing its opinions to Governments, drew their attention to Commission on Human Rights resolutions 1997/50 and 2003/31 and Human Rights Council resolutions 6/4 and 24/7, requesting them to take account of the Working Group's opinions and, where

necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty and to inform the Working Group of the steps they had taken. On the expiry of a two-week deadline, the opinions were transmitted to the relevant sources.

Opinions adopted at the sixty-ninth, seventieth and seventy-first sessions of the Working Group

Opinion No.	*State*	*Government reply*	*Person(s) concerned*	*Opinion*
1/2014	Bahrain	Yes	Tagi Al-Maidan	Detention arbitrary, category III
2/2014	China	Yes	Chen Kegui	Detention arbitrary, category III
3/2014	China	Yes	Ilham Tohti	Detention arbitrary, categories II and III
4/2014	China	Yes	Ma Chunling	Detention arbitrary, categories II and V
5/2014	Iraq	Yes	Shawqi Ahmad Omar	Detention arbitrary, category III
6/2014	Myanmar	No	Brang Yung	Detention arbitrary, categories III and V
7/2014	Plurinational State of Bolivia	No	Jacob Ostreicher	Case filed (person released)
8/2014	China	Yes	Xing Shiku	Detention arbitrary, categories I and II
9/2014	Cuba	Yes	Iván Fernández Depestre	Detention arbitrary, category II
10/2014	Egypt	No	Mohamed Essayed Ali Rasslan, Mohamed Mohamed Abdo Abdullah, Ahmed Hussein Ali, Ahmed Mohamed Tohamy Motaz Ahmed Motwali, Mohamed Mohamed Abduh, Assayed Mohamed Ezzat Ahmed, Assayed Saber Ahmed Suleiman, Ahmed Hassan Fawaz Atta, Mohamed Abdel Hamid Abdel Fattah Abdel Hamid, Sayyed Ali Abdel Zaher, and Mahmoud Abdel Fattah Abbas	Detention arbitrary, categories II and III
11/2014	Yemen	No	Haytham Al Zaeetari	Detention arbitrary, categories II and III
12/2014	United Arab Emirates	No	Khalifa Rabia Najdi	Detention arbitrary, categories I, II and III
13/2014	Yemen	No	Mohammad Muthana Al Ammari	Detention arbitrary, categories II and III

Opinion No.	*State*	*Government reply*	*Person(s) concerned*	*Opinion*
14/2014	Saudi Arabia	No	Zakaria Mohamed Ali	Detention arbitrary, categories I, II and III
15/2014	Canada	No	Michael Mvogo	Detention arbitrary, category IV
16/2014	Democratic Republic of the Congo	No	Abedi Ngoy and Gervais Saidi	Detention arbitrary, category III
17/2014	Algeria	No	Djameleddine Laskri	Detention arbitrary, categories I and III
18/2014	Saudi Arabia	No	Tawfiq Ahmad Ali Al Sabary	Case filed (person released)
19/2014	Thailand	No	Muhamadanwar Hajiteh, also known as Muhamad Anwal or Anwar	Detention arbitrary, category III
20/2014	El Salvador	Yes	Aracely del Carmen Gutiérrez Mejía; Verónica Beatriz Hernández Mejía and Reyna Ada López Mulato	Detention arbitrary, category III; in the cases of Ms. Hernández and Ms. López Mulato, category I
21/2014	China	Yes	Wang Hanfei	Detention arbitrary, category II
22/2014	Bahrain	No	Jassim al-Hulaibi	Detention arbitrary, category III
23/2014	Mexico	No	Damián Gallardo Martínez	Detention arbitrary, categories I, II and III
24/2014	Myanmar	No	La Ring	Detention arbitrary, categories I, II, III and V
25/2014	Bahrain	Yes	A minor	Detention arbitrary, category III
26/2014	Bolivarian Republic of Venezuela	Yes	Leopoldo López Mendoza	Detention arbitrary, categories II and III
27/2014	Bahrain	Yes	Ali Salman	Detention arbitrary, category III
28/2014	Bolivia (Plurinational State of)	No	Mario Francisco Tadic Astorga	Detention arbitrary, categories I and III
29/2014	Bolivarian Republic of Venezuela	No	Juan Carlos Nieto Quintero	Detention arbitrary, categories I and III

Opinion No.	*State*	*Government reply*	*Person(s) concerned*	*Opinion*
30/2014	Bolivarian Republic of Venezuela	No	Daniel Omar Ceballos Morales	Detention arbitrary, categories II and III
31/2014	Myanmar	No	Kyaw Hla Aung	Detention arbitrary, categories II and III
32/2014	Saudi Arabia	No	Tahir Ali Abdi Jama	Detention arbitrary, categories I and III
33/2014	Burundi	No	Pierre-Claver Mbonimpa	Detention arbitrary, category II
34/2014	Bahrain	Yes	Mohammed Hassan Sedif and Abdul Aziz Moussa	Detention arbitrary, II and III; in the case of Mr. Moussa, detention arbitrary category II
35/2014	Egypt	No	Khaled Mohamed Hamza Abbas, Adel Mostafa Hamdan Qatamish, Ali Ezzedin Thabit, Zain El-Abidine Mahmoud and Tariq Ismail Ahmed	Detention arbitrary, category III
36/2014	Syrian Arab Republic	No	Ammar Tellawi	Detention arbitrary, categories II and III
37/2014	Bahrain	No	Ebrahim Abdulla al-Sharqi, Taleb Ali Mohammed and Ahmed Abdulla Ebrahim	Detention arbitrary, category III
38/2014	Cameroon	Yes	Paul Eric Kingue	Detention arbitrary, categories I and III
39/2014	Tunisia	No	Salem Lani, Abdeldelwaheb Thabti, Mabrouk Gasser, Elfakhem Elwichi, Bechir H'rabi, Monji Maiz, Ibrahim Thabti and Saïd Chibili.	Detention arbitrary, categories I, III and V
40/2014	Turkmenistan	No	Arslannazar Nazarov and Bairamklich Khadzhiorazov	Detention arbitrary, category III
41/2014	Thailand	No	Patiwat Saraiyaem	Detention arbitrary, category II
42/2014	Yemen	No	Tariq Saleh Saeed Abdullah Alamoodi	Detention arbitrary, categories I and III
43/2014	Israel	No	Ahmad Ishraq Rimawi	Detention arbitrary, category III

Opinion No.	*State*	*Government reply*	*Person(s) concerned*	*Opinion*
44/2014	Congo	No	Mbanza Judicaël, Kimangou Joseph, Miakamouna Nzingoula Sylvain, Bibila Gilbert, Mabiala Mpandzou Paul Marie, Tsiakala Valentin, Baboyi Antoine, Silaho René, Matimouna Mouyecket Euloge, Kialounga Pierre Placide, Tandou Jean Claude Davy, Ngoma Sylvain Privat, Banangouna Dominique Mesmin and Loudhet Moussa Landry	Detention arbitrary, categories I, II and III
45/2014	Togo	Yes	Kpatcha Gnassingbe, Ougbakiti Seïdou, Essozimma (Esso) Gnassingbe, Abi Atti, Soudou Tchinguilou, Kokou Tchaa Dontema and Efoé Sassouvi Sassou	Detention arbitrary, category III
46/2014	Cameroon	No	Christophe Désiré Bengono	Detention arbitrary, categories I and III
47/2014	Yemen	No	Nadeer Saleh Mohseen Saleh Al Yafei	Detention arbitrary, category III
48/2014	Lebanon	No	Tarek Mostafa Marei and Abdel Karim Al Mustafa	Detention arbitrary, categories I and III
49/2014	China	No	Jingling Tang, Qingying Wang and Xinting Yuan	Detention arbitrary, category III
50/2014	United States of America	Yes The Government of Cuba replied after the adoption of the opinion.	Mustafa al Hawsawi	Detention arbitrary, categories I, III and V
51/2014	Bolivarian Republic of Venezuela	Yes	Maikel Giovanni Rondón Romero and 316 other persons	Detention arbitrary, category III
52/2014	Australia/ Papua New Guinea	No	Reza Raeesi	Detention arbitrary, category IV
53/2014	Oman	Yes	Talib Ahmad Al Mamari	Detention arbitrary, categories II and III
54/2014	Oman	Yes	Sagr Mohamed Al Balloushi, Said Hamid Al Meqbaly, Tallal Moubarak Al Meqbaly, Khamis Kassif Al Mamari, Abdurrahman Rashed Al Ghafili, Abdullah Saleh Al Mamari, Abdullah Hassan Al Balloushi, Badr Mohamed Al Mamari and Abdulmajid Sarhan Al Ghafili	Detention arbitrary, category II
55/2014	China	Yes	Ziyuan Ren	Case filed

Opinion No.	*State*	*Government reply*	*Person(s) concerned*	*Opinion*
56/2014	United Arab Emirates	Yes	Saleh Farag Dhaifullah, Ibrahim Abdulaziz Ibrahim Ahmad, Mohamed Adulmoneim Mohamed Mahmoud, Ahmad Mahmoud Taha, Medhat Mohamed Mustafa Al Ajez, Ali Ahmad Ibrahim Sonbol, Mohamed Mahmoud Ali Shahdah, Abdullah Mohamed Ibrahim Zaza, Salah Mohamed Rezq Al Mashad, Abdullah Al Arabi Abdullah Omar Ibrahim, Ahmad Gafar, Abdulmoneim Ali Al Said Atyea and Mourad Mohamed Hamed Othman	Detention arbitrary, category III
57/2014	Lebanon	No	Mohammed Ali Najem and 71 other persons	Detention arbitrary, categories I and III

3. Reactions from Governments concerning previous opinions

15. By note verbale dated 19 February 2014, the Permanent Mission of Mexico to the United Nations Office at Geneva transmitted the additional information requested by the Working Group in its opinion No. 58/2013 (Mexico). According to the information provided, the judicial process is still at the preliminary investigation stage; Marco Antonio de Santiago Ríos was arrested in flagrant delict; and during his apprehension, the police officers fully observed the principles of legality, lawfulness, objectivity and efficiency and acted with professionalism, respecting the rights of the person captured.

16. By letter dated 28 February 2014, the Government of Sri Lanka submitted a late response regarding the case of Varnakulasingham Arulanandam (opinion No. 48/2013 (Sri Lanka)). In its letter, the Government provided information on the reasons and circumstances of Mr. Arulanandam's arrest and detention and on the ongoing court proceedings against him. It stated, inter alia, that Mr. Arulanandam had been promptly informed of the charges against him and brought before the magistrate every month since his arrest.

17. By letter dated 26 December 2013, the Government of Libya informed the Working Group that opinion 41/2013 (Libya) contained a number of errors, and refuted that the detention of Saif al-Islam Gaddafi was arbitrary. The Government stated, inter alia, that Mr. Gaddafi had been investigated by the public prosecutor and charged with a number of crimes under domestic legislation, and that the Libyan authorities were willing and capable of trying Mr. Gaddafi, as evidenced by the case of Abdullah al-Senussi, in which the International Criminal Court had determined that domestic authorities were willing and genuinely able to investigate the case.

18. Concerning opinion 38/2013 (Cameroon) on the detention of Michel Thierry Atangana Abega, the Government of Cameroon, by letter dated 31 January 2014, noted with surprise that it had not been granted a deadline extension of 60 days for the submission of its response. The State further argued that the Working Group should give proper space for the simple, yet fundamental, principle of adversarial debate. It informed the Working Group that Mr. Atangana was in detention for embezzlement of public funds, and that the detention was not politically motivated. The Government expressed regret at the

precipitation surrounding the examination of the case, and it deplored the overall tone of the opinion.

19. By note verbale dated 12 March 2014, the Permanent Mission of Paraguay to the United Nations Office at Geneva transmitted the additional information requested by the Working Group in paragraph 46 of its opinion No. 31/2013 (Paraguay) on the detention of Lucía Agüero Romero and others. According to the information provided, the preliminary investigation into the case concluded on 9 October 2013 and the judicial process is due to enter the oral phase (hearings); 12 persons have been formally charged and accused and 3 persons have been released without charges. It is expected that five of the accused will continue to be held in pretrial detention, six will be held under house arrest and one will await the process at liberty. The Government also provided information concerning the medical attention provided to the detainees who were on a hunger strike.

20. By letter dated 25 November 2013, the Government of Tunisia provided a late response on the case of Jabeur Mejri (opinion No. 29/2013 (Tunisia)).

21. By letter received on 13 December 2013, the Government of the Islamic Republic of Iran provided a late response on the case of Amir Nema Hekmati (opinion No. 28/2013 (Islamic Republic of Iran)). According to the Government, Mr. Hekmati was tried by Branch 15 of the Revolutionary Court of Tehran on charges of cooperation with the Government of the United States of America and its Central Intelligence Agency (the CIA), to work against the system of the Islamic Republic of Iran. The Court found Mr. Hekmati guilty of the charges and sentenced him to death. His counsel appealed the judgement and Mr. Hekmati's sentence was subsequently reduced to 10 years of imprisonment. His counsel appealed the reduced sentence, but the appellate court upheld the sentence.

22. By letter dated 27 January 2014, the Government of Turkmenistan sent additional information on the case of Gulgeldy Annaniyazov (opinion No. 22/2013 (Turkmenistan)). The Government informed the Working Group that Mr. Annaiyazov had stolen a passport of another resident of Ashgabat City in July 2002 for the purpose of illegally crossing the border to travel to the Russian Federation via Kazakhstan. When he returned to Turkmenistan in June 2008, he crossed the border without proper documents and permits. The Government considered that the Working Group's reasoning was incorrect, as Mr. Annaiyazov's case had been properly investigated and his punishment had been determined in accordance with the law.

23. By letter dated 1 July 2014, the Government of Iraq provided a late response on the case of Shawqi Ahmad Omar, explaining the judicial processes leading to Mr. Omar's arrest and detention (opinion No. 5/2014 (Iraq)). On 9 October 2014, the Government transmitted a response to OHCHR and the Committee on Enforced Disappearances concerning the case of Mr. Omar (opinion No. 5/2014 (Iraq)), stating that the case could not be considered one of enforced disappearance, because Mr. Omar's location of detention had been identified, as mentioned in the previous communications provided by the Iraqi authorities.

24. By letter dated 14 July 2014, the Government of the United Arab Emirates provided a late response on the case of Khalifa Rabia Najdi (opinion No. 12/2014 (United Arab Emirates)), stating that Mr. Nadji had been arrested for "committing a crime in accordance with Article 180 paragraph 2 of the Criminal Law, by joining an illegal secret organization opposing the fundamental principles underlying the ruling system and whose aim is to seize power".

25. By letter dated 13 August 2014, the Government of Jordan provided a late response on the case of Hisham al Heysah and others (opinion No. 53/2013 (Jordan)).

26. By letter dated 2 September 2014, the Government of the Plurinational State of Bolivia sent a late response regarding the case of Mario Francisco Tadic Astorga (opinion No. 28/2014 (Plurinational State of Bolivia)). In its response, the Government denied all the allegations put forward by the source, including the allegations of torture, and that Mr. Astorga had not had access to legal counsel.

27. By letter dated 30 September 2014, the Government of Bahrain provided a late response regarding the case of Jassim al-Hulaibi (opinion No. 22/2014 (Bahrain)).

28. By note verbale dated 20 February 2015, the Government of Thailand submitted a late response regarding the case of Patiwat Saraiyaem (opinion No. 41/2014 (Thailand)). According to the Government, the arrest and detention of Mr. Saraiyaem was in full compliance with international norms, including relevant provisions of the International Covenant on Civil and Political Rights. Mr. Saraiyaem had pleaded guilty on the lese-majesty charge on 29 December 2014. If found guilty, he could seek a royal pardon from the King, which had been granted in most lese-majesty cases.

29. Concerning opinion No. 50/2014 (United States of America and Cuba), the Government of Cuba pointed out, in a note verbale dated 16 March 2015, that it could not do anything to prevent the use by the Government of the United States of the Guantanamo Bay Naval Base. Although Cuba has sovereignty over its entire national territory, the United States exercises jurisdiction over the territory of the Guantanamo Bay Naval Base owing to its illegal occupation. The reply from the Government of Cuba regarding opinion No. 50/2014 is reproduced as received in the annex to the present report.

30. The Government of Cuba expressed deep concern over the legal limbo that supported ongoing violations by the Government of the United States of human rights of inmates in the detention centre illegally established at the Guantanamo Bay Naval Base, including torture and deaths in custody.

4. Release of subjects of the Working Group's opinions

31. The Working Group received information from Governments and sources on the release of the following subjects of its opinions:

- Gao Zhisheng (opinion No. 26/2010 (China)) was released on 7 August 2014.
- Issam Mahamed Tahar al Barquaoui al Uteibi (opinions No. 60/2011 (Jordan) and No. 18/2007 (Jordan)) was released on 16 June 2014, after serving his five-year sentence.
- Do Thi Minh Hanh (opinion No. 42/2012 (Viet Nam)), a labour activist, was released on 26 June 2014.
- On 19 June 2014, magistrates in Istanbul ordered the release of 230 military officers sentenced for plotting to overthrow the Government in the "Sledgehammer" trial, following a Constitutional Court ruling on 18 June 2014 that their rights to a fair trial had been violated (opinion No. 6/2013 (Turkey)).
- Zakaria Mohamed Ali was released on 17 March 2014 and expelled to Somalia (opinion No. 14/2014 (Saudi Arabia)).
- Michael Thierry Atangana (opinion No. 38/2013 (Cameroon)) was pardoned under a presidential decree on 24 February 2014, a few days after the opinion of the Working Group had been made public. Mr. Atangana has regularly updated the Working Group on the enforcement of its three recommendations (release, accountability and reparation).

- Yorm Bopha, the subject of opinion No. 24/2013 (Cambodia), was released on bail on 22 November 2013. She was arrested again on 21 January 2014 along with other human rights activists for protesting against the imprisonment of 23 persons who had participated in a demonstration by garment factory workers. They were detained for several hours and released after they signed a statement pledging not to participate in illegal activities or protests in the future.

- Nguyen Tien Trung, one of the individuals concerned in opinion No. 27/2012 (Viet Nam), is a blogger who was convicted in January 2010 to seven years of imprisonment for alleged subversion against the State. According to the information received, Mr. Trung was released on 12 April 2014 on the basis of his good behaviour, after having served four years in imprisonment.

- Cu Huy Ha Vu, the subject of opinion No. 24/2011 (Viet Nam), is a prominent human rights lawyer who was sentenced to imprisonment for seven years in April 2011 for allegedly spreading anti-government propaganda. According to the information received, Mr. Vu was released on 5 April 2014 after having served three years in prison, and has left for another country.

- On 30 September 2014, the relevant source informed the Working Group that human rights defender Pierre-Claver Mbonimpa (opinion No. 33/2014 (Burundi)) was conditionally released from prison on 29 September 2014 on grounds of ill health. The court placed travel restrictions on him and he remains in hospital.

- On 18 October 2014, the relevant source informed the Working Group that La Ring and Kyaw Hla Aung, subjects of opinions No. 24/2014 (Myanmar) and No. 31/2014 (Myanmar), respectively, had been released from prison on 7 October 2014.

- In its opinion 12/2013 (Bahrain), the Working Group found that the detention of Nabeel Abdulrasool Rajab, a prominent Bahraini human rights defender, was arbitrary. Upon completion of his prison sentence, he was released on 24 May 2014, but the Court barred him from leaving the country. He is still facing the charge of "insulting a public institution and the army" via Twitter, pursuant to article 216 of the Bahraini Penal Code, an offence punishable by up to six years of imprisonment.

- By note verbale dated 27 November 2014, the Government of Argentina informed the Working Group that the High Court of Córdoba had ordered the end of the preventive detention of Guillermo Luis Lucas, which was subject of opinion No. 20/2013 (Argentina), and had held all the charges brought against him to be without effect.

- By note verbale of 6 January 2015, the Government of Cuba reported that Gerardo Hernández Nordelo, Ramón Labaniño Salazar and Antonio Herreros Rodríguez, held in United States federal prisons for 16 years, had been released from detention and had arrived in Havana on 17 September 2014. The Government of Cuba expressed gratitude to the Working Group for its efforts in finding a solution to this case. The Working Group had declared arbitrary the detention of these three persons, as well as the detention of Fernando González Llort and René González Schweret, in its opinion No. 19/2005 (United States of America).

- On 6 January 2015, the relevant source informed the Working Group that Khaled El-Kazaz, one of the subjects of opinion No. 39/2013 (Egypt), had been released. The charges brought against him had been dropped and his case had been closed.

32. The Working Group expresses its gratitude to those Governments that undertook positive actions and released detainees that were subjects of its opinions. However, it also expresses regret that Member States have not fully cooperated in enforcing the opinions.

5. Requests for review of opinions adopted

33. The Working Group considered the requests made by the Governments concerned for review of the following opinions: No. 39/2013 (Egypt) concerning Mohamed Mohamed Morsi Eissa El-Ayyat and others; No. 15/2014 (Canada), concerning Michael Mvogo, and No. 10/2014 (Egypt), concerning Mohamed Essayed Ali Rasslan and others.

34. After carefully and closely examining the requests for review, the Working Group decided to maintain its opinions, in accordance with paragraph 21 of its methods of work.

6. Reprisal against a subject of an opinion of the Working Group

35. The Working Group expresses its concern regarding the continued detention under house arrest of María Lourdes Afiuni Mora, the subject of its opinion No. 20/2010 (Bolivarian Republic of Venezuela), who was arrested in 2009 for ordering the conditional release of Eligio Cedeño, the subject of the Working Group's opinion No. 10/2009 (Bolivarian Republic of Venezuela). The Working Group considers the detention of Ms. Afiuni as a measure of reprisal. It reiterates its calls upon the Government of the Bolivarian Republic of Venezuela to immediately release Ms. Afiuni and to provide her with effective and adequate reparations.

7. Urgent appeals

36. During the period from 1 January 2014 to 31 December 2014, the Working Group sent 136 urgent appeals to 48 Governments concerning 435 individuals. Urgent appeals were sent to the following countries:

> Bahrain (11); Burundi (1); Cambodia (2); China (11); Congo (1); Cuba (1); Cyprus (1); Egypt (9); Eritrea (2); Ethiopia (6); Fiji (1); France (1); Gambia (1); Iran (Islamic Republic of) (16); Iraq (1); Israel (2); Jordan (1); Kazakhstan (1); Kuwait (1); Kyrgyzstan (1); Mexico (1); Morocco (4); Myanmar (3); Nepal (1); Niger (1); Nigeria (1); Oman (2); Pakistan (2); Panama (1); Qatar (1); Republic of Moldova (1); Rwanda (1); Saudi Arabia (10); Sri Lanka (1); Sudan (3); Swaziland (1); Syrian Arab Republic (3); Tajikistan (2); Thailand (3); Tunisia (1); Turkey (1); United Arab Emirates (4); United Kingdom of Great Britain and Northern Ireland (2); United States of America (1); Uzbekistan (1); Venezuela (Bolivarian Republic of) (3); Viet Nam (5); Yemen (4).

A copy of one joint urgent appeal was sent to the United Nations Resident Coordinator in the Republic of Moldova, and one urgent appeal was transmitted to the African Union.

37. The full text of the urgent appeals can be consulted in the joint reports on communications.[1]

38. In conformity with paragraphs 22 to 24 of its methods of work, the Working Group, without prejudging whether a detention was arbitrary, drew the attention of each of the Governments concerned to the specific case as reported, and appealed to them to take the measures necessary to ensure that the detained persons' rights to life and to physical integrity were respected.

39. When an appeal made reference to the critical state of health of certain persons or to particular circumstances, such as failure to execute a court order for release, the Working Group requested the Government concerned to take all measures necessary to have the

[1] For communications reports of the special procedures, see www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx.

person concerned released. In accordance with Human Rights Council resolution 5/2, the Working Group integrated into its methods of work the prescriptions of the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council relating to urgent appeals and has since applied them.

40. During the period under review, the Working Group also sent six letters of allegation to Australia, Iraq, Libya, Nigeria, the Syrian Arab Republic and Uganda.

41. The Working Group wishes to thank those Governments that heeded its appeals and that took steps to provide it with information on the situation of the persons concerned, especially the Governments that released those persons. In other cases, the Working Group was assured that the detainees concerned would receive fair trial guarantees.

B. Country visits

1. Requests for visits

42. The Working Group has been invited to visit Argentina (follow-up visit), Azerbaijan, Burkina Faso, India, Japan, Libya, Malta (follow-up visit), Nauru, Spain and the United States of America, as well as the State of Palestine.

43. As indicated in paragraph 5 above, on 24 March 2014 the Government of Nauru cancelled the scheduled visit of the Working Group, and has yet not accepted the new proposed dates for the visit.

44. The Working Group has also asked to visit Algeria, the Democratic People's Republic of Korea, Egypt, Ethiopia, Fiji, Guatemala, Guinea-Bissau, Kazakhstan, Kenya, Myanmar, Papua New Guinea, the Philippines, the Republic of Korea, the Russian Federation, Rwanda, Saudi Arabia, Sierra Leone, Singapore, the Syrian Arab Republic, Thailand, Turkmenistan, Uganda, Uzbekistan and the Bolivarian Republic of Venezuela. The Working Group has also sent requests for follow-up visits to Bahrain, China, Indonesia, Malaysia, Mexico Nicaragua (limited to Bluefields) and Viet Nam.

2. Follow-up to country visits

45. In accordance with its methods of work, the Working Group decided in 1998 to address follow-up letters to the Governments of countries it had visited, requesting information on such initiatives as the authorities might have taken to give effect to the relevant recommendations adopted by the Working Group contained in the reports on its country visits (see E/CN.4/1999/63, para. 36).

46. In 2014, the Working Group requested information from the Government of El Salvador, which it had visited in 2012. The Government submitted the requested information on 19 May 2015, that is, after the adoption of the present report. It will be considered at the next session of the Working Group and summarized in the next annual report.

C. Consideration of the title of the Working Group

47. In its resolution 1991/42 establishing the Working Group on Arbitrary Detention, the Commission on Human Rights did not define the term "detention".

48. The international human rights instruments that protect the right to personal liberty guarantee that no one shall be arbitrarily deprived of his or her liberty. The relevant international instruments do not always use the same terminology to refer to deprivation of

liberty: they may use "arrest", "apprehension", "detention", "incarceration", "prison", "reclusion", "custody", "remand" and other terms.

49. These different interpretations of the term "detention" were resolved by the adoption of Commission on Human Rights resolution 1997/50, in which the Commission opted for the term "deprivation of liberty". However, this change of terminology has not been reflected in the title of the Working Group, which often leads to misinterpretation of the mandate of the Working Group.

50. The Working Group requests the Human Rights Council to consider bringing the name of the Working Group into line with resolution 1991/42 by revising it to the Working Group on Arbitrary Deprivation of Liberty.

D. Follow-up to the joint study on secret detention

51. The Working Group has continued to consider how it can contribute to the follow-up of the joint study on secret detention (A/HRC/13/42) within its mandate. The Working Group will also follow up on its own previous reports and opinions on secret detention and anti-terrorism measures, taking account of subsequent developments, including the length of detention of individuals.

E. Prevention of imminent arbitrary deprivation of liberty

52. The Working Group has continued its deliberations on the possibility of transmitting cases to Governments in situations where an individual is at risk of being arrested pursuant to an arrest warrant or detention order issued against him or her and where the resulting deprivation of liberty is likely to be arbitrary in nature.

53. Under its methods of work, the Working Group has no mechanism to address situations where there is sufficiently reliable information that the execution of an order of arrest will inevitably result in arbitrary deprivation of liberty. In effect, the Working Group currently has to wait until the arrest warrant is executed and the person is arbitrarily deprived of his or her liberty.

54. However, a preventive mechanism might be applicable in situations where an individual is to be arrested solely because he or she has exercised the fundamental rights or freedoms guaranteed by international human rights law. Similarly, it could apply in situations where an imminent arrest would clearly constitute a violation of international law prohibiting discrimination based on national or ethnic origin, religion, political or other opinion, gender, sexual orientation or other status, and which might result in the equality of human rights being ignored.

55. If such a preventive mechanism was available to the Working Group, section V of its methods of work on the urgent action procedure would apply mutatis mutandis to the consideration of communications on imminent arbitrary deprivation of liberty.

56. As regards the action on such communications, two options can be considered: (a) if the Working Group considered that the imminent detention was not of an arbitrary nature, it would render an opinion to that effect, and such an opinion would not prejudge any further consideration by the Working Group of a communication regarding the case on other grounds provided for in the methods of work; and (b) if the Working Group considered that the arbitrary nature of the imminent detention had been established, it would render an opinion to that effect and make recommendations to the Government.

III. Thematic issues

A. Detention in the context of drug control

1. Drug policies and arbitrary detention

57. In the light of communications received and findings resulting from country visits, the Working Group notes with concern the increasing, and in some cases, systematic, instances of arbitrary detention as a consequence of drug control laws and policies.[2] The Working Group believes it is topical and necessary to further examine the relationship between drug control and arbitrary detention.

58. Arbitrary detention for drug offences or use can occur across criminal and administrative settings, particularly when procedural safeguards are absent.[3] The Working Group attaches particular importance to the fact that criminal and administrative detention for drug control purposes has a disproportionate impact on vulnerable groups, such as women, children, minority groups and people who use drugs.[4]

59. The Working Group has expressed its concern about the frequent use of various forms of administrative detention that entail restrictions on fundamental rights, and considers to be worthy of attention detention imposed as a means of controlling people who use drugs, especially when such detentions are framed as health interventions. States have incorporated such detention into national legislation based on perceived notions that drug use in itself endangers the life of the person who uses, as well as the lives of others.[5] This translates into administrative drug detention justified on the basis of health grounds, which can lead to involuntary commitment or compulsory drug treatment that is unsupported by either international drug control conventions or international human rights law.[6] The Working Group has noted as particularly worrisome instances of arbitrary detention in Brazil[7] and East Asia[8] in the context of the compulsory confinement of people who are

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[2] See, for example, Julie Hannah and Nahir de la Silva, "Human rights, drug control and the UN special procedures: preventing arbitrary detention through the promotion of human rights in drug control" (International Centre on Human Rights and Drug Policy, 2015). Available from www.hr-dp.org/files/2015/02/02/WGAD.FINAL_.30_Jan_2015_.pdf. Of the 64 reports of the Working Group, including annual and country reports, 35 have made explicit reference to drug-related practices.

[3] See, for example, E/CN.4/1998/44/Add.2, paras. 81 and 97–99 and A/HRC/27/48/Add.3, paras. 111–119.

[4] See, for example A/HRC/16/47/Add.3, A/HRC/4/40/Add.3, A/HRC/27/48/Add.3, E/CN.4/2004/3/Add.3, A/HRC/10/21/Add.3, E/CN.4/2006/7 and A/HRC/27/48.

[5] See, for example, A/HRC/4/40/Add.5, para. 92, E/CN.4/1998/44/Add.2, para. 81, and A/HRC/27/48/Add.3, para. 111.

[6] Nowhere in the three international drug control conventions (Single Convention on Narcotic Drugs, 1961; Convention on Psychotropic Substances, 1971; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988) is compulsory treatment or involuntary commitment for drug use required, and throughout the treaties penal responses and the use of treatment is subject to international and domestic law. For further discussion, see Hannah and de la Silva, "Human rights, drug control".

[7] In the State of São Paulo, compulsory confinement of addicts of crack cocaine and other drugs has been introduced in an effort to bring users on the street into detention. At the time of the Working Group's visit to São Paulo, 5,335 persons were detained in compulsory confinement. On 4 January 2013, the Governor of the State of São Paulo announced a new regional plan to fight drug consumption whereby crack users would be put in compulsory psychiatric confinement. To manage confinement, a standing court was established. In a police operation in a neighborhood of São Paulo, more than 2,000 crack users were arrested. (See A/HRC/27/48/Add.3, paras. 113–114.)

suspected of using drugs. It has been established that detention and forced labour are not scientifically valid means to treat drug dependence.[9] Compulsory detention regimes for purposes of drug "rehabilitation" through confinement or forced labour are contrary to scientific evidence and inherently arbitrary.[10]

60. Drug consumption or dependence is not sufficient justification for detention. Involuntary confinement of those who use or are suspected of using drugs should be avoided.[11]

61. The Working Group is also concerned about the use of criminal detention as a measure of drug control following charges for drug use, possession, production and trafficking. A variety of regional and international human rights instruments establish legal standards for detention based on criminal grounds, including minimum procedural guarantees.[12] These standards apply equally in cases of criminal detention for drug-related offences. Criminal laws and penal measures pursued under the existing punitive system of international drug control raise important questions of legality, proportionality, necessity and appropriateness.[13]

62. The Working Group has determined that pretrial detention regimes, including "*arraigo*" or other forms of detention to investigate, as well as bail systems, diminish a person's ability to challenge his or her detention; affect the presumption of innocence; and overwhelm the justice system. Guarantees of equal protection before the law and procedural rights to access to justice, including the exceptionality of pretrial detentions, as well as guarantees of promptness for judicial review and court hearings to determine criminal responsibility, must be ensured, including when individuals are detained for drug-related

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[8] There are five re-education through labour centres in Shanghai, including one for women, one for drug addicts, and three others for men. In cases of drug abuse, if it is a first offence, the person will be sent to a rehabilitation centre. In cases of repeated drug abuse, he or she may be sent to a re-education centre. Twenty per cent of cases are for drug-related offences (see E/CN.4/1998/44/Add.2, para. 85). See also the joint statement of 12 specialized agencies and other organizations of the United Nations system, available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11941&LangID=E; J.J. Amon and others, "Compulsory drug detention in East and Southeast Asia: evolving government, UN and donor responses", *International Journal of Drug Policy*, vol. 25, No. 1, pp. 13–20. In a published position on compulsory detention centres in East Asia and Pacific, available from www.unicef.org/eapro/media_18366.html, the United Nations Children's Fund expressed concern about "the use of compulsory detention centres in some countries in the East Asia and Pacific region where children, many of whom have been exploited in the sex trade, living on the streets, or detained for drug abuse, are being held".

[9] See United Nations Office on Drugs and Crime and World Health Organization, "Principles of drug dependence treatment", discussion paper (2008), p. 15. This is consistent with the position of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (see A/HRC/22/53, paras. 40–44).

[10] See United Nations Office on Drugs and Crime and World Health Organization, "Principles of drug dependence", p. 15.

[11] See E/CN.4/2004/3, paras. 74 and 87; Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 15; and European Court of Human Rights, *Witold Litwa v. Poland*, application No. 26629/95, judgement of 4 April 2000, paras. 77–80.

[12] African Charter on Human and Peoples' Rights, American Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[13] Rodrigo Uprimny Yepes, Diana Esther Guzmán and Jorge Parra Norato, "Addicted to punishment: the disproportionality of drug laws in Latin America", Dejusticia Working Paper 1.

reasons. As with any form of detention, such individuals must have judicial means to challenge the detention.[14] The Working Group has noted in particular that ongoing periodic judicial reviews are necessary to avoid prolonged detentions.[15]

B. Peaceful protests and arbitrary detention

63. The Working Group has received information and communications from different parts of the world on the increase of detentions of persons in the context of peaceful protests that could be considered as arbitrary in conformity with the Working Group's methods of work. Therefore, the Working Group will consider this matter as a topic in its work for 2017 in coordination with other special procedures of the Human Rights Council, the regional human rights institutions and other relevant stakeholders.

C. Remedies for arbitrary detention

64. The duty to comply with international law rests on everyone, including domestic authorities and private individuals. International and domestic law must provide remedies to make international law effective. States are under a positive obligation to provide an effective remedy for violations of international human rights law. The remedy for arbitrary detention will regularly be immediate release. In most cases, including those where release is not a remedy, the individual has a right to compensation. This right is firmly grounded in widespread international practice[16] and on the *opinio juris* of States; it is also included in a wide range of international instruments. It is found in the domestic law of almost all States, and breaches are denounced. The right constitutes a general principle of international law, based both in domestic law and its application across sectors of international law and treaty regimes.[17] Domestic law, whether constitutional or based on legislation or case law, has a particular role in the field of human rights law where the duties are primarily those of States to individuals. Domestic law is scrutinized in the Human Rights Council and its various mechanisms; indeed, many of those mechanisms have as their main aim the review of domestic law and practice. This produces much evidence of State practice and *opinio juris*. In addition, declarations and other statements made by States about their own law and its compliance with international law and further reaching human rights standards, and comments and denunciations of other States, serve as additional sources of *opinio juris*.

65. Domestic courts have a particular role in granting tort remedies (*responsabilité administrative et constitutionnelle*). Domestic law cannot erect barriers in the form of immunities, jurisdictional limitations, procedural hurdles or defences based on an Act of State doctrine that would limit the effectiveness of international law. One basis for jurisdiction is the exercise of control over individuals, and under international law it exists whenever an act attributable in the widest sense to a State has an adverse effect on anyone anywhere in the world. Article 8 of the Universal Declaration of Human Rights provides that everyone has the right to an effective remedy by the competent national tribunals for

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[14] Working Group on Arbitrary Detention, deliberation No. 4.

[15] See A/HRC/27/48/Add.3, paras. 111–119.

[16] See International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639 and *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582.

[17] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

acts violating the fundamental rights granted him by the constitution or by law. Article 9 (5) of the International Covenant on Civil and Political Rights refers to an enforceable right to compensation for unlawful arrest and detention, and article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible, and that in the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

66. The duty to provide such redress is confirmed as customary international law in the constant jurisprudence of the Working Group. The Working Group points out that the arguments raised and doctrines offered in defence against remedies have to date been only too effective. In terms of actual outcomes, international courts and tribunals and domestic courts have not provided effective remedies. It is contrary to the rule of law and the requirements of an effective international legal order to accept new restrictions that effectively bar remedies in domestic courts, since, under the international law principles of subsidiarity and complementary, the domestic legal orders have the primary responsibility to provide remedies.

67. The international law obligation to provide remedies is fulfilled primarily through domestic law. Domestic authorities and States have an obligation to apply tort law in compliance with international law, which provides minimum standards. The emerging jurisprudence of international courts[18] and United Nations human rights bodies provides important sources of law or of declarations of the law.

IV. Conclusions

68. **The Working Group welcomes the cooperation given by States in the fulfilment of its mandate, in particular with regard to the responses from Governments concerning cases brought to their attention under the Working Group's regular procedure. During 2014, the Working Group adopted 57 opinions concerning 422 persons in 30 countries. It also sent 136 urgent appeals to 48 Governments concerning 435 persons.**

69. **The Working Group welcomes the invitations extended to it to pay official visits to countries. In 2014 it conducted an official visit to New Zealand, as well as follow-up visits to Italy and to Germany. The Working Group has received invitations from the Governments of Argentina (follow-up visit), Azerbaijan, Burkina Faso, India, Japan, Libya, Malta (follow-up visit), Nauru, Spain and the United States of America, as well as from the Government of the State of Palestine. It has also requested to be invited to an additional 35 countries.**

70. **The Working Group reiterates that timely responses to its letters of allegations under its regular procedure with full disclosure from Member States furthers the cause of objectivity in rendering the Working Group's opinions. The Working Group regrets that, in some cases, Governments do not provide responses, limit their replies to general information, merely affirm the non-existence of arbitrary detention in the**

[18] See, for example, the International Court of Justice in *Diallo* (Damages), the judgement of the International Criminal Court in *The Prosecutor v. Lubanga Dyilo* (2012) and the jurisprudence of the United Nations treaty bodies, in particular the Human Rights Committee and the Committee against Torture, as well as reports by special procedures mandate holders.

country or refer to the constitutional norms preventing arbitrary detention from occurring, without making direct references to the specific allegations transmitted.

71. In its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law (see A/HRC/22/44, sect. III), the Working Group restated its constant jurisprudence on the prohibition of all forms of arbitrary deprivation of liberty, and demonstrated that it is general practice accepted as law, constituting customary international law and a peremptory norm (*jus cogens*).

72. The prohibition of arbitrary deprivation of liberty applies without territorial limitations, and to the duties of States where they have effective control and for acts by their agents abroad. International law does not accept Act of State limitations on human rights obligations. In the interactive dialogue at the twenty-second session of the Human Rights Council, States gave general support for the conclusions in the deliberation.

73. In its resolution 20/16, the Human Rights Council encouraged all States to respect and promote the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention was not lawful, in accordance with their international obligations. In a separate report (A/HRC/30/37), the Working Group is submitting to the Human Rights Council the draft basic principles and guidelines on remedies and procedures relating to that right, adopted by the Working Group at its seventy-second session.

74. In the light of communications received and findings resulting from country visits, the Working Group notes with concern the increasing instances of arbitrary detention as a consequence of drug control laws and policies. Compulsory detention regimes for the purposes of drug "rehabilitation" through confinement or forced labour are contrary to scientific evidence and inherently arbitrary.

75. Criminal laws and penal measures pursued under the existing punitive system of international drug control raise important questions of legality, proportionality, necessity and appropriateness.

76. The Working Group has received relevant information and communications on an increase of detentions in the context of peaceful protests. It intends to consider this matter as a topic in its work for the year 2017.

77. States are under a positive obligation to provide an effective remedy for violations of international human rights law. In most cases, the individual has a right to compensation. That right constitutes a general principle of international law.

78. The international law obligation to provide remedies is fulfilled primarily through domestic law. Domestic courts have a particular role in granting tort remedies, and domestic law cannot erect barriers that would limit the effectiveness of international law.

V. Recommendations

79. The Working Group on Arbitrary Detention recommends that States:

(a) Enforce and protect the right to liberty of every person under customary international law;

(b) **Ensure that the guarantees available against arbitrary arrest and detention are extended to all forms of deprivation of liberty, including house arrest; re-education through labour; prolonged periods of curfew; detention of migrants and asylum seekers; protective custody; detention for rehabilitation or treatment; and detention in transit areas and at border control checkpoints;**

(c) **Ensure that persons are not held in pretrial detention for periods longer than those prescribed by law, and that they are promptly brought before a judge;**

(d) **Remedy arbitrary detention, mainly by immediate release and compensation as required by international human rights conventions and customary international law, and assist the Working Group in the follow-up to its opinions in individual cases.**

80. **All measures of detention should be justified, adequate, necessary and proportional to the aim sought.**

81. **All persons subjected to a measure of detention should benefit at all stages from access to a lawyer of her or his choice and to effective legal assistance and representation.**

82. **All detainees should benefit from all minimum procedural guarantees, including the principle of equality of arms, the provision of adequate time and facilities for the preparation of the defence, proper access to evidence and guarantees against self-incrimination.**

83. **The Working Group requests the Human Rights Council to formally adopt the draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court.**

84. **The Human Rights Council may wish to request the Working Group, with the support of OHCHR, to undertake an in-depth analysis of arbitrary detention as a consequence of international or national drug policies, taking into account the information provided by States, international and regional organizations, organs, agencies and bodies of the United Nations system, and other relevant stakeholders, and to submit to the Council a report thereon at the end of 2017.**

85. **The Human Rights Council may wish to request the Working Group to prepare, with the support of OHCHR, an analytical report on the principles of legality, proportionality, necessity and appropriateness applicable to avoid arbitrary detentions, taking into account the lessons learned and best practices of national legal systems and international and regional human rights mechanisms, for submission to the Council at the end of 2018.**

86. **The Human Rights Council may wish to remind States that they are under a positive obligation to provide an effective remedy for violations of international human rights law.**

Annex

[Original: Spanish]

Reply from the Government of Cuba concerning opinion No. 50/2014

El Gobierno de Cuba no ha podido hacer nada para impedir los diversos usos que el Gobierno de Estados Unidos ha hecho de la Base Naval en Guantánamo, pues aunque el Estado cubano ejerce su soberanía sobre todo el territorio nacional, son los Estados Unidos los que ejercen jurisdicción sobre el territorio de la Base Naval de Guantánamo, mientras dure su ilegal ocupación.

La actual Constitución de la República de Cuba repudia y considera ilegales y nulos los tratados, pactos o concesiones concertados en condiciones de desigualdad o que desconocen o disminuyen su soberanía y su integridad territorial, como es el caso del Convenio para las Estaciones Carboneras y Navales de 1903, que dio lugar a la ocupación de esta porción del territorio cubano por los Estadas Unidos, y del Tratado de Relaciones entre la República de Cuba y los Estados Unidos de América de 1934, el cual ratificó la permanencia de la Base Naval de los Estados Unidos en Guantánamo, y desde 1959, el gobierno cubano ha reclamado al gobierno estadounidense la devolución de ese espacio del territorio cubano ocupado ilegalmente contra la voluntad de su pueblo.

Los usos que el Gobierno de los Estados Unidos ha dado a la Base Naval en Guantánamo ni siquiera están previstos en los espurios tratados antes mencionados.

El Gobierno de Cuba ha expresado su profunda preocupación por el limbo jurídico que sustenta la permanente y atroz violación por el Gobierno de los Estados Unidos de los derechos humanos de los prisioneros confinados en el centro de detención en la ilegal Base Naval de Guantánamo como un centro de torturas y muertes en custodia.

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on Arbitrary Detention

Addendum

Follow-up mission to Germany*

Summary

The Working Group on Arbitrary Detention conducted a follow-up visit to Germany between 12 and 14 November 2014 at the invitation of the Government. Throughout the visit, the Working Group enjoyed the fullest cooperation of the Government.

In the present report, the Working Group notes that reduction in prison population is a remarkable achievement for Germany, as countries struggle with the consequences of over-incarceration. The trends noted during the Working Group's 2011 visit have continued. The constitutional discourse, giving effect to international law obligations, on the proportionality of measures limiting the liberty of individuals is active in the German political and legal system.

The Working Group considers that the German sentencing regime and the review of pretrial detention constitutes international best practice.

Necessity and proportionality under international law require alternatives to the detention of migrants who do not obtain the right to remain in the country. International law, restated in the jurisprudence of the Working Group, requires that migration-related detention is a last resort and only for the shortest period of time. The Working Group requests the Government to reduce the length of the detention to the period of time strictly necessary for identification. To safeguard the rights of asylum seekers and refugees, the Government is requested to prohibit pre-deportation custody orders against

* The summary of the present report is circulated in all official languages. The report itself, which is annexed to the summary, is circulated in the language of submission only.

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persons belonging to particularly vulnerable groups, such as unaccompanied minors. The Government is also requested to take steps to prevent human rights violations during deportations.

The report makes reference to the process of giving effect to international law requirements to the post-sentence preventive detention regime (*Sicherungsverwahrung*) which continues in a dialogue with the European Court of Human Rights. The Working Group notes that violations of the Convention for the Protection of Human Rights and Fundamental Freedoms also constitute violations of international law. The International Covenant on Civil and Political Rights and customary international law require that additional detention be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of similar crimes being committed in the future. Such detention is a last resort, and regular periodic reviews by an independent body must be ensured to decide whether continued detention is justified.

According to the report, certain detention regimes and restrictions on personal liberty that under international law are considered punishment are not considered as such under German law, and consequently there are different guarantees against retroactivity, including less effective remedies.

The Working Group repeats its recommendations that members of the police in all Länder should be effectively identifiable so that they can be held accountable. The Working Group follows the development of best practices that comply with international law, including obligatory identification badges in Berlin and other Länder. The Working Group welcomes continued dialogue on this issue and on independent complaints mechanisms open to all individuals.

In its recommendations, the Working Group asks the Government not to limit court review of deportation orders, and to build on the achievements in reducing the number of foreigners awaiting deportation in detention. International law and the principle of the rule of law require that individuals retain the right to court review when faced with deportation.

Detention is the last resort and only allowed when necessary and proportionate, and when there are no less burdensome alternatives.

Annex

[English only]

Report of the Working Group on Arbitrary Detention on its visit to Germany (12–14 November 2014)

I. Introduction

1. The Working Group on Arbitrary Detention, established pursuant to former Commission on Human Rights resolution 1991/42, whose mandate was clarified by Commission resolution 1997/50, and extended for a further three-year period by Human Rights Council resolution 24/7 of 26 September 2013, conducted a follow-up country visit to Germany from 12 to 14 November 2014 at the invitation of its Government. The Working Group was represented by its Chair-Rapporteur, Mads Andenas (Norway). He was accompanied by the Secretary of the Working Group and two interpreters.

2. Throughout the follow-up visit and in all respects, the Working Group enjoyed the fullest cooperation of the Government of Germany and all authorities with which it dealt. The Working Group would like to extend its gratitude and appreciation to the Government for its quick and prompt response to the Working Group's request to carry out its follow-up visit. This should indeed be highlighted, as it displays the willingness of this Government to cooperate with the Working Group and, in general, the special procedure mandate holders.

3. The Federal Government observes that it had been agreed between the Working Group and the Government that the official discussions during the visit should, due to the short notice of the visit, focus on the question of preventive detention and the reforms in this area since 2011. All information about other areas of law contained in the report are therefore based on information received by the Working Group from other sources and do not represent the outcome of any substantive discussions with the Federal Government.

4. The Working Group was able to meet with and interview detainees confidentially as required by its mandate.

5. The Working Group would also like to thank the representatives of German civil society for their support during the visit, particularly representatives of the national human rights institution and non-governmental organizations, human rights defenders, lawyers, academics and jurists, who met with the delegation and provided the Working Group with important information and assistance. Additionally, the Working Group wishes to thank colleagues at the Office of the United Nations High Commissioner for Refugees for their valuable assistance.

II. Programme of the follow-up visit

6. The Working Group met with senior authorities from the executive, legislative and judicial branches of the State, including representatives of the Ministries of Foreign Affairs, Interior and Justice; members of the Committee on Legal Affairs and Consumer Protection of the Deutscher Bundestag (Parliament); magistrates; judges; prosecutors; and public defenders and representatives of the Berlin Senate Department for Justice. The delegation also visited the Tegel Penal Institution in Berlin.

III. Status of the implementation of recommendations contained in the report on the 2011 Working Group's visit to Germany

7. The following is the analysis of the implementation of the recommendations made by the Working Group at the end of its 2011 visit (see A/HRC/19/57/Add.3, para. 68).

(a) Recommendation: All appropriate measures should be taken to ensure that deprivation of liberty is only used as a measure of last resort and for the shortest possible time

8. The Working Group considers that detention is the last resort and only allowed when necessary and proportionate, and when there are no less burdensome alternatives.

9. At the time of the Working Group's follow-up visit, the prison population was 64,379, including 11,119 pretrial detainees and 348 juvenile under the age of 18. The prison system has a capacity of 77,243 inmates.

10. The Working Group notes that the reduction in prison population is a remarkable achievement for Germany, as many countries struggle with the consequences of over-incarceration. The trends noted by the Working Group during its 2011 visit have continued. The constitutional discourse, giving effect to international law obligations on the proportionality of measures limiting the liberty of individuals, is active in the German political and legal system. The German sentencing regime and the review of pretrial detention constitute international best practice.

11. The Working Group notes with satisfaction the legislative amendment prohibiting children in detention from being placed with persons up to the age of 24.

12. The Working Group is continuing discussions with the Government on several issues related to detention. For example, there is a need to monitor and remedy the disproportionate application of pretrial detention in the case of foreign nationals and Roma, including minors.

13. According to the Federal Government, there are no figures to support the Working Group's presumption that there is a disproportionate application of pretrial detention with regard to foreign nationals and Roma. Nor has there been any systematic evaluation of this question by the Working Group. The Federal Government therefore does not share the conclusion made in paragraph 12.

(b) Recommendation: States (Länder) should consider the model of independent special commissions for the investigation of police officers in cases of alleged misconduct or alleged ill-treatment, such as that established in Hamburg

14. The Working Group is concerned that cases of alleged ill-treatment or excessive use of force by the police were not always investigated promptly, independently, impartially or effectively.

15. According to the German Institute for Human Rights, data on police violence have long shown a discrepancy between the number of criminal proceedings and the number of convictions, which it attributed to an increased reluctance on the part of officers to incriminate their colleagues, as well as to the difficulty of proving such offences.

16. The Working Group is also concerned that, with the exception of the police forces in Berlin and Brandenburg, police officers are not obliged to wear identification badges showing their name or number during the exercise of their functions. Even in those two Länder, the obligation to wear a badge might be withdrawn in order to protect the safety and security of the police officers. According to a study commissioned by the Berlin Police,

some 10 per cent of cases of alleged ill-treatment by police officers could not be investigated or prosecuted because the officers involved were not wearing identification.

17. The Working Group repeats its recommendation that members of the police in all Länder should be effectively identifiable so that they can be held accountable. The Working Group is following the development of best practices that comply with international law, including obligatory identification badges in Berlin and other Länder. The Working Group welcomes continued dialogue on this issue and on independent complaints mechanisms open to all individuals.

(c) Recommendation: Concerning the post-sentence preventive detention regime, the Working Group recommends that the Government give full effect to the mechanism set out by the Federal Constitutional Court in its May 2011 judgement for the compliance with the decision of the European Court of Human Rights

18. The Working Group is concerned about the number of persons who are still detained in post-conviction preventive detention in Germany (252 persons at time of the follow-up visit; 38 persons in Berlin), and the duration and conditions of such detention.

19. The system of preventive detention in Germany is undergoing a major reform, in the light of recent judgments of the European Court of Human Rights and the Federal Constitutional Court. The Working Group is following how the process of giving effect to international law requirements for the post-sentence preventive detention (*Sicherungsverwahrung*) regime continues in a dialogue with the European Court of Human Rights, which has further cases on the issue under consideration. In 2014, Germany graduated from the enhanced supervision regime of the Council of Europe Committee of Ministers to standard supervision, in recognition of its implementation of the Court's judgments.

20. The Implementation Act under the Federal Law of the Distance Requirement in the Law Governing Preventive Detention of 5 December 2012 entered into force on 1 June 2013. The Act implements the requirements that the Federal Constitutional Court set forth in its leading judgment of 4 May 2011. The distance requirement is the difference in treatment between preventive detainees and prisoners serving sentences. According to the Government, the Act represents the federal-law element of a new freedom-oriented and therapy-based overall concept of preventive detention for implementing the distance requirement. The goal is to enable those in preventive detention to be released as early as possible by reducing the risk they pose.

21. Such detainees should be offered adequate treatment options during the execution of their prison sentences. Otherwise, their placement in preventive detention would be disproportionate; in this case, the execution of preventive detention must be suspended on probation. Adequate treatment options should also be offered as part of regular judicial reviews to determine whether preventive detention should continue. These judicial reviews are to be conducted annually and, after 10 years of preventive detention, every nine months.

22. The responsibility for the execution of preventive detention is with the Länder. Länder should establish specific rules governing the detainees' everyday activities, which should differ significantly from those serving prison sentences.

23. At time of the Working Group's follow-up visit, 252 persons were in preventive detention in Germany, 86 of whom have been in preventive detention for more than 10 years. During 2009 and 2010, there were more than 500 persons in preventive detention.

24. Responsibility for preventive detention lies with the Länder. They are drafting guidelines for employing preventive detention. Problems have arisen concerning the

allocation of resources to preventive detention, given the high cost of the facilities and the social/therapeutic and psychological programmes.

25. The Working Group notes that violations of the European Convention also constitute violations of international law. The International Covenant on Civil and Political Rights and customary international law require that additional detention be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of similar crimes being committed in the future. Such detention is a last resort, and regular periodic reviews by an independent body must be ensured to decide whether continued detention is justified.

26. States must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society.

27. If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 of the International Covenant on Civil and Political Rights and customary international law prohibit a retroactive increase in sentence. States may not circumvent this prohibition by imposing a detention that is equivalent to penal imprisonment under any other label. Articles 9 and 15 of the Covenant and customary international law, as restated by the Human Rights Committee in its general comment No. 35 (2014) on article 9 (liberty and security of person) and in the practice of the Working Group, clearly prohibit the imposition of the new preventive detention regime of 1998, including the provisions which would allow the extension of detention after the completion of penalties (and other restrictions under domestic law).

28. The Working Group notes that it is still unsatisfactory that certain detention regimes and restrictions on personal liberty that, under international law, are considered punishment are not so considered under German law, and that consequently there are different guarantees against retroactivity, including less effective remedies.

29. The Federal Government considers the statements made in paragraphs 25 and 26 as, at least, incomplete since they are based on the former legislation and do not take the amendments made sufficiently into account. Normative and practical changes have been made to address the concerns with regard to international law. Following these changes, there remain — limited — possibilities to extend detention on preventive grounds after the completion of penalties which have been considered as compatible with the European Convention on Human Rights by the European Court of Human Rights, including preventive detention as regulated by the judgement of the Federal Constitutional Court or reserved preventive detention (see *Müller v. Germany*, decision of 10 February 2015, application No. 264/13). These concerns have been addressed in legislation and the corresponding changes in the detention regime.

Visit to Tegel Penal Institution

30. The delegation was able to visit the new compound destined to hold preventive detainees in Tegel, which has a multistorey building with large living areas and a big courtyard. However, this building is located at the end of the detention's compound and access to it is through the prison entrance. New therapeutic activities and motivation programmes are being developed. Facilities are very good but upkeep is very expensive. At time of the Working Group's follow-up visit, there were 38 persons in preventive detention in Tegel. This special compound can hold up to 60 persons.

31. The Working Group was informed that the programmes in Tegel are therapy-oriented, rather than release-oriented. All preventive detainees are undergoing a treatment assessment and a treatment plan.

(d) Recommendation: The use of restraints, such as handcuffs and shackling, in remand hearings should be monitored; guidelines would provide assistance in the application of the relevant proportionality test

32. The Government reported that shackling detainees is a permissible practice in all of the Länder. The practice of "Fixierung", i.e. using restraints to deprive detainees of the ability to move, is tied to stringent prerequisites and is used only in some Länder and in rare and exceptional cases. Such means of restraint are used only in situations in which the parties affected pose a hazard to themselves or others.

33. The Working Group notes that the use of restraints, such as handcuffs and shackling, in remand hearings is applied by the court hearing the case, applying the proportionality requirement of the criminal procedure statute. The general proportionality test applied seems to be in conformity with fair trial and other relevant international standards. The issue of concern continues to be the inconsistent application of restraints, without any justification offered for the clear differences between the local courts that the Working Group visited in 2011. The Working Group repeats its recommendation that the use of restraints be monitored. Statistical information and guidelines may provide assistance at different levels, including for the judges who must apply the relevant proportionality test.

(e) Recommendation: The use of alternatives to detention for foreigners who are not in possession of a valid visa or whose visa is expired should always be considered

34. In 2012, Germany became the second largest recipient of migrants in the world, second only to the United States of America. In 2013, 127,000 persons sought protection in Germany. Some 4,812 persons were placed in immigration detention. Germany continues to make wide use of its prison system to hold foreigners in administrative detention. Of the 16 Länder, 10 use prisons for detaining migrants.

35. The Federal Government finds no basis in fact for the allegation in paragraph 34 that Germany made "wide use of prisons" for pre-removal detainees.

36. In July 2014, the Court of Justice of the European Union found that the practice of Germany of using prisons for immigrants was incompatible with Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (cases of *Bero and Bouzalmate*;[1] case of *Pham*[2]).

37. The Working Group notes that necessity and proportionality under international law require alternatives to detention of migrants who do not obtain the right to remain in the country. International law, restated in the jurisprudence of the Working Group, requires that migration-related detention is a last resort and only for the shortest period of time.

38. The Government finds no basis in fact for the allegation that offences under section 95 (1) of the Residence Act were subject to "harsh sentencing". As far as the Government is aware, proceedings for such offences are in practice either discontinued or end with only mild sentences being handed down.

[1] Judgement of 17 July 2014, joined cases C-473/13 and C-514/13.
[2] Judgement of 17 July 2014, case C-474/13.

(f) Recommendation: The issue of proportionality in the detention of foreigners for illegal entry to the country or for illegal border crossing, coupled with harsh sentencing, should be carefully addressed

39. In June 2014, the Federal Ministry of the Interior presented draft legislation addressing, inter alia, certain aspects of the detention of foreign nationals, including detention under Regulation No. 343/2003 of the Council of the European Union of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (the Dublin II Regulation). The draft legislation was commented upon by international agencies[3] and several non-governmental organizations. With regard to immigration detention, the breadth of criteria in the draft was sharply criticized. However, as the different ministries responsible are still in the process of coordinating work on the law, the final draft version is not available.

40. The Working Group urges the Government to reduce the length of the detention to the period of time strictly necessary for identification.

41. The Government pointed out that, under German law, detention prior to deportation may only be ordered to secure the actual execution of the deportation order. This is only possible if the identity and nationality of the person to be deported have been established. German law does therefore not provide for detention in order to establish the identity of a foreign national.

(g) Recommendation: An individual risk assessment should be requested to process forcible returns of foreigners, particularly in the cases of foreigners requesting political asylum. The risk of persecution and discrimination in countries of origin should be evaluated, and essential economic and social rights should be considered

42. The Government stated that foreigners undergoing asylum proceedings in Germany are under no circumstances forced to return to their country of origin, i.e. the potential country of persecution. The Working Group, in many instances, uses the term "asylum seekers" in the meaning of *rejected* asylum seekers, i.e. persons required to leave the country.

43. To safeguard the rights of asylum seekers and refugees, the Government is requested to prohibit pre-deportation custody orders against persons belonging to particularly vulnerable groups, such as unaccompanied minors. The Government is asked to adopt law and practice so that traumatized and psychologically ill persons are not detained, but instead receive the treatment necessary.

44. The Government noted that the situation of particularly vulnerable groups is already taken into account when pre-deportation detention is decided upon. Minors are detained extremely rarely in practice and, as with any detention under German law, by order of a judge only.

45. The Government is also requested take steps to prevent human rights violations during deportations. International law and the principle of the rule of law require that individuals retain the right to court review when faced with deportation.

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[3] Available in German at www.unhcr.de/fileadmin/rechtsinfos/fluechtlingsrecht/3_deutschland/3_2_unhcr_stellungnahmen/FR_GER-HCR_Referentenentwurf_062014.pdf.

46. According to the Government, this seems to imply that there is no right to court review with regard to deportation orders. This is not the case; German law does provide for the right to court review of deportation orders.

47. In 2009, the Federal Court of Justice (Bundesgerichtshof) was designated the last instance court for all cases of detention for the purpose of removal in Germany. Since then, it has delivered a great number of judgments improving the position and rights of persons, including asylum seekers, in detention. Most of the decisions concerned the right to a fair hearing and the formal requirements of a request for detention.

48. In 2013, the Federal Court of Justice ruled that a person in pre-deportation detention must be provided with the means necessary to legally defend him- or herself against the detention order, including by the appointment of a lawyer, if a person in his or her position would reasonably hire a lawyer but does not have the financial means to pay for one him- or herself.[4]

49. Legal aid is paid in order that a person in pre-deportation detention hire a lawyer in appeals against negative decisions only if the appeal is likely to succeed according to the court's summary assessment.

50. Other decisions of the Federal Court of Justice show that a request for detention has to detail the country of destination, the specific procedure that is expected to be carried out and the time frame that the enforcement of a deportation to that specific country would take.[5]

51. Moreover, the decisions of the various courts examine the proportionality of detention orders, for example, the following: an illegal border crossing in itself does not justify detention;[6] the detention period must be limited to the minimum amount of time necessary to execute a removal order;[7] and any indication of a change of circumstances possibly affecting the legality of the (continued) detention must lead the court in charge to investigate and reconsider the original detention order.[8]

52. Several thousand asylum seekers whose application has been definitively rejected and who are required to leave the country and a majority of those who are the subject in the cases under the Dublin II Protocol continue to be accommodated in Länder detention facilities immediately upon arrival, sometimes for long periods. This practice would contravene Directive 2008/115/EC of the European Parliament. The Government stated that this is simply wrong in fact.

53. With regard to detention prior to deportation, the Residence Act and the related General Administrative Rules already provide for alternative measures. The authorities are required to examine whether less severe means are sufficient, which is also mentioned in section 62 (1) of the Residence Act, for example. Reducing the length of detention to the period of time strictly necessary is required under section 62 (1) of the Residence Act. The use of detention as *ultima ratio* already ensues from the principle of proportionality which stems directly from the Constitution. According to the Government, the Working Group

[4] Federal Court of Justice, decision of 28 February 2013, case No. V ZB 138/12.

[5] For example, Regional Court Frankfurt/Oder, decision of 2 October 2013, case No. 15 T 122/13; Federal Court of Justice, decision of 7 March 2013, case No. V ZB 116/12.

[6] For example, Regional Court of Munich I, decision of 31 July 2013, case No. 13 T 16164/13.

[7] For example, Federal Court of Justice, decision of 26 September 2013, case No. V ZB 2/13; Federal Court of Justice, decision of 10 October2013, case No. V ZB 25/13; Regional Court of Dresden, decision of 12 November 2013, case No. 2 T 821/13.

[8] Federal Court of Justice, decision of 30 October 2013, case No. V ZB 69/13.

should sufficiently recognize this constitutional dimension of the principle of proportionality in German law.

54. Decisions on the necessity of separate accommodation for persons in pre-removal detention and ordinary prisoners detained under criminal law had a great impact. Most importantly, some German courts submitted requests to the Court of Justice of the European Union concerning the interpretation of the principle of separation of pre-removal detainees from detainees under criminal law under article 16 (1) of Directive 2008/115/EC.[9]

55. Specialized detention facilities exist in only 5 of 16 Länder. Several regional courts had (preliminarily) suspended the execution of detention orders where a separated placement of third-country nationals in pre-removal detention and ordinary prisoners was not guaranteed.[10]

56. The Court of Justice of the European Union ruled on 17 July 2014 in its decision on the joint cases of *Bero and Bouzalmate*, and the case of *Pham*, that a Member State — irrespective of its federal structure — cannot rely on the fact that there are no specialized detention facilities in a part of its territory to justify keeping aliens in an ordinary prison pending their removal (*Bero and Bouzalmate*), and that the same rule applies even if the migration detainee has consented to being confined in a penitentiary (*Pham*). Thus, several Länder had to find other practical solutions.

57. The decision of the Court of Justice of the European Union resulted in several Länder not being able to accommodate their pre-removal detainees anymore. As a consequence, some of them are transferring them to other Länder, such as Berlin, where separated immigration detention facilities exist. Such practice was explicitly regarded as compatible with Directive 2008/115/EC by the Court. In fact, some large detention centres (such as the Büren prison in North-Rhine-Westphalia) that had served as a detention facility for significant numbers of pre-removal detainees are no longer used for that purpose.

58. Furthermore, at the political level, there are discussions about the abolition of immigration detention and the removal of immigration detention facilities in general.

59. Pre-deportation detention has also been applied for securing asylum seekers' Dublin transfers to another member State of the European Union determined to be responsible according to the Dublin II Regulation.

60. Under the new Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (the Dublin III Regulation), detention securing Dublin transfers of asylum seekers to another member State (to date based on certain provisions in national law) must be based on article 28 of the Dublin III Regulation and the criteria set out therein. Inter alia, this requires "a significant risk of absconding" to be present.

61. However, in accordance with article 2 (n) of the Dublin III Regulation, objective criteria for "risk of absconding" must be set out in national law. The Federal Court of Justice decided recently that the most relevant existing national provisions do not comply with article 2 (n), so there is currently no legal basis for Dublin detention, as a rule; certain rather exceptional situations of a risk of absconding were considered by the Federal Court

[9] Federal Court of Justice, decision of 11 July 2013, case No. V ZB 40/11.

[10] For example, Local Court of Laufen, decision of 12 November 2013, case No. XIC 221/13; Regional Court of Görlitz, decision of 23 October 2013, case No. 2 T 102/13; Regional Court of Munich II, decision of 16 October 2013, case No. 6 T 4334/13.

of Justice to be sufficiently defined as to constitute a provision in accordance with article 2 (n) of the Dublin III Regulation (for instance, a change of the place of stay without informing the authorities of the new address).[11]

62. This led to a situation where there is practically no pre-deportation detention of asylum seekers for securing "Dublin transfers" in Germany at the time of the Working Group's follow-up visit. The Federal Government is working on the adoption of the necessary provisions. The process is ongoing and it is likely that Dublin detention will become relevant again after the adoption of legal amendments.

63. The Working Group continues to be concerned at the lack of procedure for the identification of vulnerable asylum seekers, such as unaccompanied minors or traumatized refugees, in a number of Länder. The only mandatory medical checks are those for tuberculosis. Systematic examinations to diagnose mental illnesses or traumatization upon arrival are not conducted.

The "fast-track" procedure at German airports

64. The legal basis for the "fast-track" procedure at German airports is paragraph 18 of the Asylum Procedure Act.[12] According to a landmark decision by the German Federal Constitutional Court,[13] the restriction of movement and liberty at these facilities does not constitute detention as, according to the Court, there is the option to leave by plane; although this is a problematic argumentation with regard to asylum seekers and will in fact not be possible in many cases given the need for personal documentation and sufficient financial means to purchase a plane ticket. Neither the leading decision of the European Court of Human Rights *Amuur v. France* (application No. 17/1995/523/609, judgement of 25 June 1996), nor the subsequent decision *Gebremedhin [Gaberamadhien] v. France* (application No. 25389/05, judgement of 26 April 2007) brought any changes in German jurisprudence.

65. The "fast-track" airport procedure remains problematic as it emphasizes speediness and shortened deadlines for legal remedies. However, the significance of the airport procedure in terms of proportionality of numbers has decreased in recent years. In 2012, only about 60 decisions have been reached with 787 applications made in German airports and 77,651 asylum applications made in Germany in total. In 2013, only 48 decisions were taken, with 972 applications made in German airports and 127,023 asylum applications made in Germany in total.[14]

(h) Recommendation: The Government should consider extending the mandate of the German Institute for Human Rights to structural and factual monitoring, as well as its consultative role in the process of drafting legislation with human rights relevance. The Institute should be allocated adequate human, financial and technical resources

66. The Working Group supports the adoption of legislation that would qualify the German Institute for Human Rights as a national human rights institution in category A in the United Nations human rights system and under the principles relating to the status of

[11] Federal Court of Justice, decision of 26 June 2014, case No. V ZB 31/14.

[12] For an English translation of the Asylum Procedure Act, see www.gesetze-im-internet.de/englisch_asylvfg/index.html.

[13] In 1996, decision of 14 May 1996 (case No. 2 BvR 1516/93), BVerfGE 94, 166).

[14] See most recent statistics available in the Federal Government's reply to a Parliamentary request on asylum statistics (2013, official document 18/705). Available (in German only) at http://dipbt.bundestag.de/doc/btd/18/007/1800705.pdf.

national institutions for the promotion and protection of human rights (the Paris Principles), which would appropriately reflect the position of Germany in the international community.

(i) **Recommendation: The Government should consider promulgating a binding legal regulation by the Parliament establishing that the Convention on the Rights of the Child and its Optional Protocols have priority over alien and asylum laws**

67. The Working Group notes that Germany has signed the Optional Protocol to the Convention on the Rights of the Child on a communications procedure. The law ratifying the Optional Protocol was adopted in 2012, and the same year Germany submitted the declarations regarding individual or inter-State communications in accordance with articles 31 and 32 of the International Convention for the Protection of All Persons from Enforced Disappearance.

68. The Working Group has also noted with approval the statements by Germany on observing the obligations under the European Convention on Human Rights and the International Covenant on Civil and Political Rights in military operations abroad. Within the scope of peace missions, Germany guarantees to all persons subject to its authority or acts of its officials and troops the rights acknowledged in international human rights conventions by which Germany is bound. The Working Group notes that this is done in compliance with international law and in recognition thereof. The Working Group also commends Germany for its early ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, the duties of States under which is customary international law and apply in military operations and other acts of the State or State officials abroad.

IV. Conclusions

69. **The Working Group considers that the reduction in prison population is a remarkable achievement for Germany, as many countries struggle with the consequences of over-incarceration. The trends noted during the Working Group's 2011 visit have continued.**

70. **The reduction of the number of persons in preventive detention (from more than 500 persons in 2009 and 2010 to 252 at the time of the Working Group's follow-up visit) is also noteworthy.**

71. **The constitutional discourse, giving effect to international law obligations, on the proportionality of measures limiting the liberty of individuals is active in the German political and legal system. The German sentencing regime, and the review of pretrial detention, constitutes international best practice.**

72. **The Working Group continues the discussion with the Government on several detention issues. There is a need to monitor and remedy the disproportionate application of pretrial detention in the case of foreign nationals and Roma, including minors.**

73. **Necessity and proportionality under international law require alternatives to the detention of migrants who do not obtain the right to remain in the country. International law, restated in the jurisprudence of the Working Group, requires that migration-related detention is a last resort and only for the shortest period of time.**

74. **The Working Group is following how the process of giving effect to international law requirements to the post-sentence preventive detention regime continues in a dialogue with the European Court of Human Rights, which has further related cases under consideration.**

75. The International Covenant on Civil and Political Rights and customary international law require that additional detention be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of similar crimes being committed in the future. Such detention is a last resort, and regular periodic reviews by an independent body must be ensured to decide whether continued detention is justified.

76. States must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society.

77. Although the European Court of Human Rights has on several occasions accepted the German system of preventive detention as such (e.g. *G. v. Germany*, application No. 65210/09, judgement of 7 June 2012, paras. 46 ff.), it is still unsatisfactory that certain detention regimes and restrictions on personal liberty that under international law are considered punishment are not so considered under German law, and consequently there are different guarantees against retroactivity, including less effective remedies.

78. The abolition of the maximum duration for the first-time preventive detention in 1998 and the introduction of retrospective preventive detention in 2004 led to serious concerns with respect to retroactivity under the European Convention on Human Rights. These concerns have been addressed by legislation and the corresponding changes in the detention regime. Public trust in the police is of paramount importance in democratic societies. Accountability and transparency of the police forces are necessary conditions for such trust. The Working Group invites the Government to provide it with information on the measures adopted to identify individual police officers when their uniform and equipment make them unidentifiable.

79. The Working Group notes with approval statements by Germany on observing the obligations under the European Convention on Human Rights and the International Covenant on Civil and Political Rights in military operations abroad. Within the scope of peace missions, Germany guarantees to all persons subject to its authority or acts of its officials and troops the rights acknowledged in international human rights conventions by which Germany is bound.

80. The Working Group has noted the high degree of compliance with the current draft of the basic principles on the right of anyone deprived of their liberty by arrest or detention to bring proceedings before court that the Working Group has presented in accordance with Human Rights Council resolution 20/16, and which is declaratory of international law and based on the human rights conventions, customary international law and general principles of international law.

V. Recommendations

81. The Working Group reiterates its recommendation that deprivation of liberty must be used as a measure of last resort in all cases, and for the shortest possible time. Alternative sentences, such as probation or community service, should be examined.

82. The Working Group highlights the ongoing dialogue on preventive detention between the Federal Government and the European Court of Human Rights and the Council of Europe Committee of Ministers.

83. **Authorities should take into account the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) when devising the measures alternative to preventive detention.**

84. **To safeguard the rights of asylum seekers and refugees, the Government should prohibit pre-deportation custody orders against persons belonging to particularly vulnerable groups, such as unaccompanied minors. The Working Group recommends that the Government reduce the length of the detention to the period of time strictly necessary for identification.**

85. **There is a need for special attention to be given to vulnerable asylum seekers during the initial medical check.**

86. **The Working Group recommends that the Government adopt law and practice so that traumatized and psychologically ill persons are not detained, but instead receive the treatment necessary. The Government should also take steps to prevent human rights violations during deportations.**

87. **The Working Group recommends that the Government not limit court review of deportation orders, and build on the achievements in reducing the number of foreign nationals awaiting deportation in detention.**

88. **The duration of detention pending deportation should be subjected to the strict application of the principle of proportionality and limited to the shortest possible period. The Working Group recommends that the duration of pre-deportation custody be significantly decreased.**

89. **Germany should revise its Asylum Procedure Act to extend the one-week time limit to challenge an order for deportation and submit a legal remedy and to allow suspensive orders in case of transfers of asylum seekers to any State bound by the Dublin II Regulation. Deportation should not be permissible before a court decision is handed down. The legal provisions of the Asylum Procedure Act excluding suspensive effects of the appeals against a decision to transfer an asylum seeker to another State participating in the Dublin system should also be abolished.**

90. **Access to independent, qualified and free-of-charge counselling for asylum seekers before hearings, as well as legal aid after a negative decision, should be guaranteed.**

91. **Independent, impartial and effective investigation and prosecution in cases of alleged police violence should be ensured. Länder should consider the model of independent special commissions for the investigation of police officers in cases of alleged misconduct or alleged ill-treatment, such as that established in Hamburg, which constitute best practice. Alleged victims of ill-treatment or misconduct by the police should be aware of other complaints procedures than complaints to the Police. The Working Group welcomes continued dialogue on this issue and on independent complaints mechanisms open to all individuals.**

92. **The Working Group reiterates its recommendations that members of the police in all Länder should be effectively identifiable so that they can be held accountable. The identification of individual police officers on duty should be ensured in the Federal Police and in all Länder. The Working Group follows the development of best practices that comply with international law, including obligatory identification badges in Berlin.**

93. **The Working Group supports the adoption of legislation that would qualify the German Institute for Human Rights as a national human rights institution in category**

A in the United Nations human rights system according to the Paris Principles, which would appropriately reflect the position of Germany in the international community.

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Report of the Working Group on Arbitrary Detention

Addendum

Mission to New Zealand*

Summary

The Working Group on Arbitrary Detention conducted an official country visit to New Zealand from 24 March to 7 April 2014, following an invitation from the Government. The delegation consisted of Mads Andenas (Norway), Chair-Rapporteur of the Working Group, and Roberto Garretón (Chile), a member of the Working Group. The Working Group visited the cities of Wellington, Auckland, New Plymouth (Taranaki region) and Christchurch (Canterbury region). In all the cities that it visited, the Working Group met with officials of the various ministries and of local authorities, and with first-instance judges and prosecutors.

The Working Group visited places where persons are deprived of their liberty in all of the above-mentioned cities. The appendix to the present report lists the detention facilities that the Working Group visited. The Government facilitated the visits to the places of detention, imposing no restrictions, and allowed the Working Group to conduct private and confidential interviews with detainees of its choice.

The Working Group notes that the country's legal framework regarding the right not to be arbitrarily deprived of one's liberty is well developed and is generally consistent with international human rights law and standards. The New Zealand Bill of Rights Act 1990 guarantees the right not to be arbitrarily arrested or detained. It sets out in detail the rights of persons arrested or detained, which are in conformity with article 9

* The summary of the present report is circulated in all official languages. The report itself, which is contained in the annex to the summary, is circulated in the language of submission only.

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of the International Covenant on Civil and Political Rights.

Legal requirements are complied with and arrested persons are informed of the grounds for their arrest and their legal rights. In most cases, arrested persons are immediately brought before a judge. During its visit, the Working Group observed police officers informing arrested persons of the grounds for their arrest and their legal rights immediately after their apprehension, in accordance with the New Zealand Bill of Rights Act 1990.

Detainees have the right to initiate habeas corpus proceedings to challenge the lawfulness of their detention, and in the case of unlawful detention, victims have the right to claim and obtain compensation. All prison and police officers have received suicide awareness training. The courts pay for all the interpretation and translations that they need. There are legislative provisions for the use of restorative justice at various stages in the criminal justice system.

The report focuses on preventive detention in the form of an indeterminate-length jail sentence for offenders who pose a "significant and ongoing risk" to public safety. This is considered a last resort for violent offenders and sex offenders. About 280 inmates were serving a preventive sentence at the time of the Working Group's visit. Public protection orders allow the authorities to recall a person to prison once his sentence is finished if he is at high risk of reoffending. Such orders apply to a very small number of people. Extended supervision orders can be issued by a court if a child sex offender is deemed still to present a high risk of reoffending at the end of his sentence. During the Working Group's visit, extended supervision orders were in force in respect of about 225 ex-prisoners.

According to the Working Group, preventive detention must be justified by compelling reasons, and regular periodic reviews by an independent body must be assured in order to determine whether the detention continues to be justified. The treatment of prisoners held in preventive detention must be distinct from the treatment of convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society.

It is noted in the report that New Zealand is imprisoning 183 persons per 100,000 inhabitants and that the country has a high rate of reoffending. People of Maori descent make up 51.4 per cent of the prison population, and 65 per cent of the female prison population, while Maori comprise approximately 15 per cent of the general population. As a result of the Drivers of Crime initiative, the number of young Maori coming to court decreased between 2008 and 2012 by approximately 30 per cent. However, the number of young Maori appearing in court is still four times that of non-Maori. The Working Group recommends to the Government to increase its efforts to prevent discrimination against Maori in the administration of justice. Special attention should be given to extending the protection measures under the Children, Young Persons and Their Families Act 1989 to include 17-year-olds, and young persons should not be held in police cells.

It is mentioned in the report that New Zealand has established an annual quota of 750 refugees referred by the United Nations High Commissioner for Refugees, as part of the New Zealand Refugee Quota Programme. In the 12 months to the end of June 2012, a total of 184 persons were recognized as Convention refugees (in accordance with the country's obligations under the United Nations Convention relating to the Status of Refugees, of 1951). In the same period, New Zealand received 303 new claims for refugee or protected person status. The Government makes efforts to facilitate the integration of these persons, moving people off welfare support and into employment. The Government also provides protection to certain persons under the

United Nations human rights conventions.

It is noted in the report that New Zealand does not have a mandatory detention policy for asylum seekers, refugees, or immigrants in an irregular situation. During its visit to the Mangere Refugee Resettlement Centre, the Working Group observed that the regime for persons who had requested protection status was harder than the regime for persons who had already obtained refugee status.

The report also examines the detention of persons with mental illness or intellectual disability for the purposes of compulsory care and treatment. The Working Group notes that the criteria for determining the risk of harm to self or others are not clear and that the law allows medical practitioners a wide margin of discretion to determine whether a person should undergo compulsory assessment and treatment.

Persons undergoing compulsory assessment or subject to compulsory treatment orders are often unrepresented, as they do not have sufficient financial means to seek legal advice and the availability of legal aid specifically for people with disabilities is limited.

Despite the existing safeguards under the legislation, the Working Group is concerned that there may be an underestimated number of cases of arbitrary detention of persons with mental illness. In a related context, the Working Group noted with concern the practice of seclusion in mental health services.

In its report, the Working Group recommends that deprivation of liberty of asylum seekers and immigrants in an irregular situation should continue to be used only as a measure of last resort and for the shortest possible time. New Zealand should clearly prohibit the transfer of asylum seekers to detention centres in third countries that do not meet international human rights standards or that have no procedures to promptly assess asylum seekers' claims.

The report also recommends to the New Zealand Government to continue its efforts to reduce the reoffending rate through adequate programmes, and to tackle the root causes of discrimination against Maori and Pacific Islanders in the criminal justice system. Every child should be separated from adults in detention. The Government should continue to extend measures to improve the mental-health care and treatment of people in detention. Lastly, the mandate of the country's Human Rights Commission should be extended to receive complaints of human rights violations relating to immigration laws, policies and practices and to report on them.

Annex

[English only]

Report of the Working Group on Arbitrary Detention on its visit to New Zealand (24 March to 7 April 2014)

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I. Introduction

1. The Working Group on Arbitrary Detention conducted an official country visit to New Zealand from 24 March to 7 April 2014, following an invitation from the Government. The delegation consisted of the Chair-Rapporteur, Mads Andenas (Norway), and a member of the Working Group, Roberto Garretón (Chile). They were accompanied by the Secretary of the Working Group and another Geneva-based staff member of the Office of the United Nations High Commissioner for Human Rights.

2. The Working Group thanks the Government of New Zealand for its invitation to visit the country. It appreciates the full support and cooperation extended by the New Zealand Government before and throughout the visit, as well as the valuable input provided by the civil society organizations, professors of law, members of the New Zealand Bar Association and medical doctors that it was able to meet.

II. Programme of the visit

3. The Working Group visited the cities of Wellington, Auckland, New Plymouth (Taranaki region) and Christchurch (Canterbury region). In all the cities that it visited, the Working Group met with officials of the various ministries and of local authorities, and with first-instance judges and prosecutors. The Working Group met with senior members of the executive and judicial branches of the State, including the Minister of Justice and officials of the Ministry, the Chief Justice of the Supreme Court, the Chief Judge of the District Court, the Deputy Solicitor-General, the Director of the Public Defence Service, officials of the Ministry of Foreign Affairs and Trade, representatives of Child, Youth and Family (Ministry of Social Development) and of Immigration New Zealand, officials of the Ministry of Health, the Ministry of Business, Innovation and Employment, the Department of Corrections, the New Zealand Police and the New Zealand Defence Force, and public prosecutors.

4. The Working Group also met with and consulted the national preventive mechanisms, which comprise the Human Rights Commission, the Office of the Children's Commissioner, the Independent Police Conduct Authority, the Inspector of Service Penal Establishments, and the Ombudsman, as well as members of the Mental Health Review Tribunal. In Auckland and New Plymouth, the Working Group also met with the district inspectors. The Working Group regrets, however, that it was unable to meet members of the legislature during its visit, due to the parliamentary recess.

5. The Working Group visited places where persons are deprived of their liberty in all the cities that it visited. The appendix to the present report provides a list of detention facilities that the Working Group visited. The Working Group thanks the Government of New Zealand for allowing it to visit the places of detention without restriction and conduct private and confidential interviews with detainees of its choice.

6. During the visit, the authorities expressed to the Working Group their commitment to take recommendations by United Nations human rights mechanisms into account.

III. Overview of the institutional and legal framework

A. Political and institutional system

7. New Zealand has a parliamentary system of government. The Sovereign, Queen Elizabeth II, is the Head of State and is represented by the Governor-General. The population of the country is approximately four and a half million.

8. New Zealand's constitutional foundations are based on the rule of law and on the principle of separation of powers, which ensures the independence of each of the three branches of the State, namely the legislature, the executive and the judiciary.

9. The Sovereign and the House of Representatives, the members of which are democratically elected for a three-year term, form the unicameral Parliament. Seven seats of the 120-member Parliament are reserved for representatives of the Maori population — the original inhabitants of New Zealand. The number of Maori seats in Parliament is proportional to the number of people on the Maori electoral roll.

10. The New Zealand Police are responsible for internal security. The Department of Corrections is an independent public sector department whose main responsibility is the management of the corrections system, which includes the Prison Service and the Probation Service.

11. The Supreme Court, composed of the Chief Justice and no fewer than four or more than five other judges appointed by the Governor-General, is the country's highest court. The Court of Appeal is the highest appellate court below the Supreme Court. It hears appeals from the High Court. The High Court hears appeals from lower courts and reviews administrative actions. Original jurisdiction lies in the High Court. There are also specialized courts, such as the Maori Land Court, the Maori Appellate Court, the Environment Court, the Employment Court, family courts and youth courts. Military jurisdiction encompasses the Court Martial and the Court Martial Appeal Court. The standing orders of the House of Representatives prohibit a Member of Parliament from "using offensive words" against a member of the judiciary. Judges are protected against salary reductions and politically motivated removal from office.

12. One of the essential foundations of the New Zealand system of government is the Treaty of Waitangi, which was signed between Maori chiefs and the British Crown in 1840. The Treaty granted the Crown the authority to govern in partnership with the Maori chiefs and guaranteed the right of Maori to self-determination. It also affirmed the right of non-Maori to reside in and to belong to New Zealand, and the rights of Maori on an equal footing as British subjects. The Treaty of Waitangi is the founding document of New Zealand as a nation, although is not a formal part of its domestic law.

13. There are a number of socioeconomic factors that place Maori at a disadvantage in fully realizing the promise of the Treaty in the modern system of government. Maori have the poorest education, health, welfare and justice outcomes in the country. During its visit, the Working Group received allegations of persistent bias against Maori at all levels of the criminal justice system. The rights of Maori have begun to be fully recognized over the past 40 years. The establishment of the Waitangi Tribunal in the 1970s was an important step in that direction, although its decisions are not binding.

14. New Zealand has in place a number of independent institutions established and mandated by legislation to monitor the protection of human rights. The Human Rights Commission, established in 1978, is an independent body that is mandated to, inter alia, advocate and promote respect for and appreciation of human rights in society. The Commission is the central national preventive mechanism that examines the conditions and

treatment in places of detention, as part of New Zealand's fulfilment of its obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

15. Complaints of discrimination may be resolved through the complaints mechanism of the Human Rights Commission, which includes mediation and other low-level dispute resolution mechanisms. If they fail or are inappropriate, complainants may take their case to the Human Rights Review Tribunal for adjudication. Decisions of the Human Rights Review Tribunal may be appealed to the High Court on questions of fact and law, and to the Court of Appeal on points of law.

16. Other national preventive mechanisms include:

(a) The Office of the Ombudsman, responsible to Parliament but independent of the Government, whose mandate is to investigate complaints against central and local government agencies. The role of the Ombudsman includes providing an external and independent review process for individual detainees' grievances, and carrying out investigations on their own initiative. As a national preventive mechanism, the Office is responsible for monitoring the treatment of persons detained in prisons, immigration detention facilities, health and disability places of detention (e.g. hospitals and secure care facilities), youth justice residences and care and protection residences;

(b) The Independent Police Conduct Authority, which is an independent Crown entity with a statutory mandate to investigate complaints against the police concerning misconduct, or neglect of duty, or concerning any police policy, practice or procedure. The Authority also investigates incidents of death or serious bodily harm involving the police. As a national preventive mechanism, the Authority is responsible for monitoring the treatment of persons detained in police cells or otherwise in the custody of the police;

(c) The Office of the Children's Commissioner, which is an independent Crown entity with a statutory mandate to monitor the services provided by Child, Youth and Family under the Children, Young Persons and Their Families Act 1989. As a national preventive mechanism, the Office is responsible for monitoring the treatment of children and young persons in youth justice residences and care and protection residences;

(d) The Inspector of Service Penal Establishments, who is an official appointed independently by the Chief Judge of the Court Martial of New Zealand. As a national preventive mechanism, the Inspector is designated to monitor the treatment of persons detained in service penal establishments.

17. The Human Rights Commission is currently developing the country's second national action plan for human rights, building on recommendations made during the recent universal periodic review of New Zealand. The Working Group was informed that the Commission expects to complete the plan by the middle of 2015. The Commission has sought engagement from civil society, business, and government agencies.

B. International human rights obligations

18. New Zealand is a party to all the main international human rights instruments, including the International Covenant on Civil and Political Rights. However, it is not a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Convention relating to the Status of Stateless Persons, the Optional Protocol to the Convention on the Rights of

the Child on a communications procedure or the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

19. New Zealand has made a declaration under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recognizing the competence of the Committee against Torture to receive communications from individuals subject to its jurisdiction.

20. During the visit, the authorities expressed to the Working Group their commitment to consider incorporating most of the international human rights instruments into its domestic legal procedures.

21. New Zealand has reservations to certain provisions of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child pertaining to the rights of juveniles in the criminal justice system. It has reserved its right not to apply article 10 (2) (b) of the Covenant to separate accused juveniles from adults in cases where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable. Similarly, it has made a reservation to the requirement under article 10 (3) of the Covenant to separate juvenile offenders from adults in the penitentiary system "where the interests of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned". New Zealand has reservations to the same effect to article 37 (c) of the Convention on the Rights of the Child.

22. New Zealand citizens may avail themselves of the complaint provisions under the individual communications procedures contained in both the First Optional Protocol to the International Covenant on Civil and Political Rights and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

C. Legal safeguards

23. Overall, New Zealand's legal framework concerning the right to liberty is well developed and is generally consistent with international human rights law and standards. New Zealand does not have a written constitution. The New Zealand Bill of Rights Act 1990 guarantees a range of civil and political rights, including the right not to be arbitrarily arrested or detained. It sets out in detail the rights of persons arrested or detained, which are in conformity with article 9 of the International Covenant on Civil and Political Rights, including the right to be informed of the reasons for his or her arrest and the right to be brought promptly before a judge.

24. The law provides for the right to a fair trial. It guarantees the presumption of innocence, the right to a jury trial, the right of appeal, and the right to present witnesses and evidence, to access government-held evidence and to question witnesses, as well as adequate time and facilities to prepare a defence. The judiciary, which is independent, enforces those rights.

25. A court-issued warrant is necessary in order to make an arrest, but the police may arrest a suspect without a warrant in cases of *flagrante delicto*. In any case, the police must inform arrested persons immediately of their legal rights and of the grounds for their arrest.

26. The Working Group observed that, in general, these legal requirements are complied with and arrested persons are informed of their rights. Arrested persons are immediately brought to a judge and may be held in police custody for a maximum of two nights if, for example, they were arrested on a Saturday afternoon, when the first possible court appearance is on Monday morning.

27. Pursuant to section 21 of the Bail Act 2000, a police officer has the discretion to grant bail to anyone who has been arrested without a warrant and has been charged with a non-serious offence. The bail issued by the police ends at the first court appearance. Court bails are granted unless there is a significant risk that the suspect would flee, tamper with witnesses or evidence or commit a crime while on bail.

28. Family members are granted prompt access to detainees. Detainees are allowed prompt access to a lawyer of their choice. If indigent, the detainee is allowed prompt access to a lawyer provided by the Government and paid for by the Ministry of Justice. Legal aid is available for criminal, family and civil proceedings and for Maori to appear at the Waitangi Tribunal. The Legal Services Amendment Act 2013 introduced changes to the way in which legal aid is managed.

29. Suspects are not detained incommunicado. Home detention in an appropriate, suitable and approved residence is commonly used as an alternative to prison for convicted non-violent offenders.

30. The right to challenge the lawfulness of detention is well entrenched. In addition to section 23 (1) (c) of the New Zealand Bill of Rights Act 1990 which provides for this right, the Habeas Corpus Act 2001 allows a detainee or any other person to apply for a writ of habeas corpus to the High Court in order to challenge the lawfulness of any form of detention, on an urgent basis.

31. The New Zealand Bill of Rights Act 1990 also stipulates the rights of persons charged with an offence at the pretrial stage and in the determination of the charge. These rights mirror the minimum guarantees set out in article 14 of the International Covenant on Civil and Political Rights, such as the rights to be informed promptly and in detail about the nature and cause of the charge against them, to receive legal assistance, and to be tried without undue delay. In addition, the Act explicitly provides for "the right to have the free assistance of an interpreter" if necessary. The Act, as well as other domestic legislation, provides the guarantees set out in article 14 of the Covenant.

32. The Human Rights Act 1993 prohibits discrimination on the grounds of sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origin, disability (including illness), age, political opinion, employment status, family status, and sexual orientation. It also prescribes the structure and mandate of the country's Human Rights Commission.

33. People charged with an offence punishable by imprisonment of two years or more have the right to trial by a jury of 12 persons. Prosecutors and defence lawyers ensure that persons of different backgrounds are adequately represented on the jury. The courts pay for all interpreting and translation provided.

IV. Findings

A. Positive aspects

34. The Working Group observed that police officers inform arrested persons of the grounds for their arrest and their legal rights immediately after their apprehension, in accordance with the New Zealand Bill of Rights Act 1990. In application of the principle that a person must be detained for the shortest possible time, the police have the authority to release a person on bail until the first court appearance in the case of minor offences. The New Zealand Police maintains the National Intelligence Application, a secure database that registers all detentions. Registration upon entry in police stations, internal movements and

departures and subsequent transfers to other places of detention are recorded electronically in an instantaneous and transparent fashion.

35. The Working Group observed in its interviews in private with detainees that detainees are promptly brought before a judge for determination of the legality of their detention. Detainees have the right to initiate habeas corpus proceedings to challenge the lawfulness of their detention, and in the case of unlawful detention, victims have the right to claim and obtain compensation.

36. The Working Group also observed how the due process rights of accused persons are respected, including the right to be informed promptly of the charges brought against them, the right to legal counsel, the presumption of innocence, and the right not to be compelled to plead guilty or to testify against themselves.

37. The Working Group further observed how prison facilities generally comply with international standards as regards comfort, hygiene and cleanliness, the provision of adequate food, access to medical care and the availability of recreational activities.

38. The Government permits visits to prisons by independent human rights observers. Independent visits to places of detention are not subject to administrative discretion but rather are guaranteed by law. Transgender inmates can serve their sentences in a prison for their identified gender. The Government is trying to reduce the level of reoffending among female inmates by setting up preventative programmes, and mother-baby feeding facilities, and by enhancing opportunities for family visits. Children aged up to 9 months or 2 years (depending on the prison) are allowed to live with their mothers in prison.

39. The Working Group observed, as a best practice, that the courts pay for all interpreting and translation delivered to them, in accordance with the requirement in domestic legislation for them to do so. Another positive aspect is that all correction officers have received suicide awareness training. In addition, the New Zealand Police requires its officers to demonstrate they have the necessary knowledge and skills to manage incidents involving mental health consumers and is developing e-learning modules that will support the police in recognizing, engaging with and responding to people experiencing mental distress. One of those modules specifically addresses suicide.

40. The police's Adult Diversion Scheme provides for the use of restorative justice as a matter of police practice. Restorative justice is available if the victim in an individual case consents to a restorative justice meeting. Restorative justice is available at various stages in the criminal justice system, including in family group conferences for young people, prior to sentencing, following a guilty plea, and after sentencing. Restorative justice gives the victim the opportunity to meet the offender face to face; the parties understand the consequences of their actions and take responsibility for them.

B. Preventive detention, public protection orders and extended supervision orders

41. Preventive detention is an indeterminate jail sentence for offenders who pose "a significant and ongoing risk" to public safety. Section 87 of the Sentencing Act 2002 gives the High Court the power to impose a sentence of preventive detention where a person over 18 years of age at the time of committing a qualifying sexual or violent offence is convicted of that crime and the court is satisfied that the person is likely to commit another qualifying sexual or violent offence if he or she is released at the expiry date of the sentence. Courts are allowed to fix an appropriate non-review period of not less than five years; after that period, the offender is entitled to regular reviews of the preventive sentence.

42. Preventive detention is considered a last resort for violent offenders and sex offenders. At time of the Working Group's visit, about 280 inmates were serving a preventive sentence.

43. Public protection orders allow the authorities to recall a person to prison once his sentence is finished if he is at high risk of reoffending. They were designed to take account of offenders who were sentenced before preventive detention was introduced. Individuals subject to public protection orders are required to live in a secure property on prison grounds that is separate from the main prison buildings. Such orders only apply, in practice, to a very small number of people.

44. Extended supervision orders can be issued by the courts if a child sex offender is still deemed high-risk at the end of his sentence. Special conditions, such as Global Positioning System (GPS) monitoring for up to 10 years, are set by parole boards once serious offenders have been released into the community. They have a 10-year expiry date. During the Working Group's visit, extended supervision orders were being applied to about 225 ex-prisoners. Officials explained to the Working Group that extended supervision orders had shown over the past ten years that they were an effective tool in protecting both the community and ex-prisoners.

45. The Working Group has particular concerns about the wider availability of preventive detention since the enactment of the Sentencing Act 2002, about extended supervision orders under the Parole Act 2002, about the options for intellectually disabled offenders in the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 and about the Public Safety (Public Protection Orders) Bill.

46. The Working Group has noted the arguments made during the parliamentary debate on the Public Safety (Public Protection Orders) Bill, as well as the observations made in two submissions to the Justice and Electoral Committee, in support of the view that the Public Safety (Public Protection Orders) Bill is not in compliance with international law, as well as the observations in the regulatory impact statement by the Department of Corrections and in the submissions by the Law Society and the Human Rights Commission. It has also noted the cautious balancing by the Attorney-General in his statement, and the robust parliamentary discussion where views differed but everyone wanted to keep within international obligations.

47. The Human Rights Committee and the Working Group have clarified the requirements under international law, which can be restated as follows:

(a) When a criminal sentence includes a punitive period followed by a preventive period, once the punitive term of imprisonment has been served, in order to avoid arbitrariness, the preventive detention must be justified by compelling reasons, and regular periodic reviews by an independent body must be assured to determine whether the detention continues to be justified;

(b) The treatment of prisoners held in preventive detention must be distinct from the treatment of convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society. If a prisoner has served the sentence imposed at the time of conviction, international law prohibits an equivalent detention under the label of civil preventive detention. The grounds for detention must be defined with sufficient precision in order to avoid overly broad or arbitrary application.

48. The Public Safety (Public Protection Orders) Act 2014 came into force on 12 December 2014. The Act seeks to protect the public from almost certain harm by a small number of serious sexual or violent offenders. It does so by creating a new legislative regime to allow the High Court to make a public protection order. The Working Group considers that preventive detention following a punitive term of imprisonment must be

justified by compelling reasons. The grounds for preventive detention must be defined with sufficient precision in order to avoid overly broad or arbitrary application. Regular periodic reviews by an independent body must be assured to determine whether it continues to be justified. The treatment of prisoners held in preventive detention must be distinct from the treatment of convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society.

C. Pretrial detention and the detention of convicted persons

49. There are currently 20 prisons under the remit of the Department of Corrections: 17 men's prisons and three women's prisons. The total number of persons detained in prisons in New Zealand at time of the Working Group's visit was 8,500 and the penitentiary system had capacity for 9,549. Of those persons, 19 per cent were pretrial detainees, 6 per cent were female, and 4 per cent were juveniles between 15 and 19 years of age. In 2013, the average time in pretrial detention was 62 days. At the time of the Working Group's visit to Auckland Prison, there were 623 prisoners; the prison has the capacity to hold 681.

50. The main types of offences for which prisoners had been convicted were violent offences (40.6 per cent); sexual offences (20.3 per cent); dishonesty (18.3 per cent) and drugs and antisocial offences (9.9 per cent).

51. New Zealand is imprisoning 183 persons per 100,000 inhabitants. The prison population has been steadily growing for most of the last 30 years. Pretrial detainees are housed separately from convicted prisoners. The country has a high rate of reoffending. Of those reoffending, 60 per cent were unemployed prior to their imprisonment and 65 per cent have an alcohol or drug problem.

52. The Sentencing Act 2002 is the principal legislation governing the sentencing regime. It provides for alternative types of detention to incarceration, such as house arrest and community detention. The Corrections Act 2004 sets out a legal framework that covers the administration of custodial sentences and remands, community-based sentences, home detention and parole. The Parole Act 2002 sets out an elaborate system of early release from detention.

53. Concern was expressed during the Working Group's visit that the Parole Amendment Bill of 2012 unnecessarily reduces the number of parole hearings and increases the length of time that the offender spends in prison. Offenders eligible for parole hearings have opportunities for such hearings every two years under the Amendment Bill, as opposed to every year under the Parole Act 2002.

D. Detention of Maori

54. Persons of Maori descent comprise 51.4 per cent of the prison population, while Maori comprise approximately 15 per cent of the general population. Sixty-five per cent of the female prison population are of Maori descent. The overrepresentation of Maori in the prison population poses a significant challenge, as recognized in New Zealand's report for the Human Rights Council's universal periodic review in 2014.

55. The Working Group has been able to study the Drivers of Crime initiative. The authorities have pointed out that, as a result of this initiative, the number of young Maori coming to court decreased between 2008 and 2012 by approximately 30 per cent, but the Government has acknowledged that the rate of young Maori appearing in court is still four

times that of non-Maori. Maori account for 54 per cent of all young people appearing at the Youth Court and 71 per cent of child offenders appearing at the Family Court.

56. The Working Group has also been able to study the implementation of the Youth Crime Action Plan, which focuses on reducing apprehensions, prosecutions and reoffending, particularly for Maori. The Working Group also discussed with authorities of the New Zealand Police the need for, and work on, developing a decision-making model to address inconsistencies in the way in which apprehensions of children and young people are resolved, and was able to pursue this in its visits to police stations and places of detention. The Working Group has also studied how traditional and Maori-centred approaches and solutions are sought by the police and the wider criminal justice system in a number of ways.

57. The Working Group recalls that the Committee on the Elimination of Racial Discrimination, the Human Rights Committee and, in two reports, the Special Rapporteur on the rights of indigenous peoples have recommended that New Zealand increase its efforts to prevent discrimination against Maori in the administration of justice. Particular concerns have been raised in relation to the overrepresentation of Maori women.

58. The Government has sought to reduce Maori reoffending through special programmes to integrate Maori cultural values into the prison rehabilitation programmes. Five Maori focus units, involving approximately 300 inmates, have integrated Maori values into the prison rehabilitation programmes.

59. Another positive development is the work by the Department of Corrections and the New Zealand Police to reduce reoffending, prevent discrimination, raise cultural awareness among law enforcement and corrections staff, and improve consistency in decision-making by reducing subjective judgements susceptible to bias. The Working Group is concerned about the extent to which such inconsistencies and bias as pointed out by the Government in its universal periodic review report is systemic, and about the degree of such systemic bias.

60. With regard to the extent, the Working Group found indications of bias at all levels of the criminal justice process: the investigative stage, with searches and apprehension; police or court bail; extended custody in remand; all aspects of prosecution and the court process, including sentencing; disciplinary decisions while in prison; and the parole process, including the sanctions for breach of parole conditions. Bias could typically follow where some aspect of a person's social status or the presence of a disability was treated as an aggravating or mitigating factor.

61. The Working Group considers that special attention should be given to the disproportionately negative impacts on Maori of criminal justice legislation that extends sentences or reduces probation or parole. The current initiatives of the Department of Corrections are oriented towards reducing reoffending by 25 per cent by 2017. In the 2014–2015 period, the Department has helped 1,370 young Maori offenders to integrate positively in their communities. In addition, the New Zealand Police has adopted a strategy to reduce Maori offending, reoffending and victimization.

62. The Working Group notes that the imprisonment rate of Maori and Pacific Islanders is disproportionately higher than that of other ethnic groups. Pacific Islanders, who make up 6.5 per cent of the general population of the country, experience societal discrimination problems quite similar to those experienced by Maori. Pacific Islanders account for approximately 10 per cent of inmates.

E. Detention of children and young persons

63. Juvenile detainees come under the jurisdiction of Child, Youth and Family (Ministry of Social Development). A notable gap remains in relation to the legislative protection available to children aged 17 years. They are considered to be adults as far as their penal responsibility is concerned, are tried as adults, and if convicted, are sent to adult prisons. However, male prisoners aged 17 or under are housed in separate units from the general prison population.

64. There is no separate unit for female prisoners aged 17 years or under because there are generally fewer than five at any time throughout New Zealand. The recommendations by the Committee on the Rights of the Child and the Committee against Torture to extend the protection measures under the Children, Young Persons and Their Families Act 1989 to include 17-year-olds have not been followed. The Working Group also heard evidence on the detention of young persons in police cells.

65. The Working Group was informed that New Zealand is currently reviewing its practices relating to the separation of young people deprived of their liberty from adults, as part of an ongoing review of its reservation to article 37 (c) of the Convention on the Rights of the Child. The Government reported that the Department of Corrections had been in compliance with article 37 (c) of the Convention since 2006.

66. The Working Group received complaints that young people were often held in police custody for longer than adults, because of the lack of alternative secure facilities in which to hold them. The Government reported that during the 2013/14 financial year, 64 young people were placed in police cells for more than 24 hours.

F. Detention of asylum seekers and immigrants in an irregular situation

67. New Zealand was one of the first States to accede to the United Nations Convention relating to the Status of Refugees, of 1951. The Government has established an annual quota of 750 (± 10 per cent) refugees and their immediate dependent family members referred by the United Nations High Commissioner for Refugees, as part of the New Zealand Refugee Quota Programme. In the 12 months to the end of June 2012, a total of 184 people were recognized as Convention refugees. At the same time, New Zealand received 303 new claims for refugee or protected person status. The Government makes efforts to facilitate their integration into New Zealand, moving them off welfare support and into employment. The Government also provides protection to certain persons under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under the International Covenant on Civil and Political Rights.

68. The Working Group notes that New Zealand does not have a mandatory detention policy for asylum seekers, refugees, or immigrants in an irregular situation. Judges have the authority to order the continued detention of immigrants in an irregular situation in cases where the immigrants' own actions are preventing their deportation. The Immigration Amendment Act 2013 introduced a provision that requires the mandatory detention of asylum seekers who arrive in New Zealand by boat as part of a "mass group" containing 30 or more persons. These persons may be detained for an initial period of six months on a group warrant, which then is renewable at 28-day intervals.

69. In 2002, the High Court ruled that detained asylum seekers had the right to seek release on bail. However, the Court of Appeal overturned the High Court decision and ruled that the immigration service had the power to detain refugee status claimants under certain circumstances.

70. Detained asylum claimants and undocumented persons who have been refused entry into the country (turnaround cases) have a right to habeas corpus to challenge the need for their detention.

71. It is of concern to the Working Group that New Zealand is using the prison system to detain irregular migrants and asylum seekers. They are being held in Waikeria Prison, Arohata Prison for Women and Mt. Eden Corrections Facility. These prisons, and police stations, do not provide separate facilities for immigrants in an irregular situation or asylum seekers.

72. The Government has announced that it will, if requested, take 150 refugees from Australia and that it might, subject to enabling legislation, transfer asylum seekers who arrive by boat in the "processing centres" in Nauru and Papua New Guinea, where persons are held in breach of international law. No formal arrangement has been entered into between the Governments of those two countries regarding the announcement. The Working Group recalls that States have obligations not to transfer individuals to camps where they are held in violation of international law.

73. On 29 March 2014, the Working Group visited the Mangere Refugee Resettlement Centre, which has capacity for 150 persons. At the time of the Working Group's visit, the Centre was accommodating a refugee quota intake of 138 persons who were participating in the six-week reception programme and undergoing health assessments, as well as eight asylum seekers (four of whom had been detained under the Immigration Act 2009 and four of whom were on conditional release to the Centre). Quota refugees who are accommodated at the Centre are New Zealand residents and as such can freely leave the Centre without seeking permission. The regime for persons who had requested protection status was harder than the regime for persons who had already obtained refugee status. Both categories of people may leave the Centre, but those who have requested protection status must request authorization. Some institutions, such as the Auckland University of Technology, are helping the Centre with programmes for refugees.

74. The Working Group emphasizes that detention of immigrants in an irregular situation and asylum seekers should normally be avoided and should only be a measure of last resort. Children and other vulnerable persons should not be detained pending resolution of their claims. Alternatives to detention should always be given preference. International evidence suggests that humane and cost-effective mechanisms such as community release programmes can be very successful.

75. Immigration New Zealand usually facilitates access to legal aid and interpreting services. Asylum seekers can access free interpreting and translation through the legal aid system. However, the Working Group received information about cases where asylum seekers and irregular migrants had not been provided with legal representation and interpreting and had been detained in police stations or remand prisons.

76. The Working Group considers that the Immigration Amendment Act 2013 should be interpreted so as not to breach New Zealand's domestic and international obligations under the Convention relating to the Status of Refugees, of 1951. New Zealand prohibits the transfer of asylum seekers to detention centres in third countries which do not meet international human rights standards or which have no procedures to promptly assess an asylum claim. Any use by New Zealand of offshore processing centres would require legislative amendment.

77. The Working Group adds its voice to the 2010 recommendation of the Human Rights Committee requesting the Government to extend the mandate of the Human Rights Commission so that it can receive complaints of human rights violations relating to immigration laws, policies and practices, and report on them.

G. Detention of persons in health facilities

78. In New Zealand, persons with mental illness or intellectual disabilities may be detained for the purposes of compulsory care and treatment. The Mental Health (Compulsory Assessment and Treatment) Act 1992 allows the detention of persons who have been assessed as having a "mental disorder", which is, in essence, defined as "an abnormal state of mind" that "poses a serious danger to the health or safety of that person or of others" or "seriously diminishes the capacity of that person to take care of himself or herself". It sets out the multi-layered processes of a compulsory assessment, whereby a person may be subject to compulsory assessment for 5 days in the first period and for a further 14 days in the second period. While the trigger for detention is not mental illness but rather the risk of harm to self or others, the Working Group noted that the criteria for determining the risk are not clear and that the Act allows medical practitioners a wide margin of discretion to determine whether a person should undergo compulsory assessment and treatment.

79. At all stages of compulsory assessment, the Act merely requires a medical practitioner's opinion that there are reasonable grounds for believing that a person may be suffering from a mental disorder or is mentally disordered. In that regard, the Working Group was informed of some cases where persons with mild mental health issues had been subjected to compulsory assessments against their will, without substantial evidence that they posed a risk to themselves or to others. At the end of the second period of assessment and treatment, the clinician responsible must apply to the Family Court for a compulsory treatment order if he or she is of the opinion that the person is still mentally disordered. The Family Court tends to heavily rely on the reports of the clinician responsible and one other health professional, who is most often a registered mental health nurse, in making the orders, as it does not have expertise in the matter of mental health. In 2012, 4,328 applications for compulsory treatment orders were granted, which amounts to 89 per cent of the total number of applications.

80. What emerged from examining the implementation of this legislative framework is that in practice, compulsory assessments and treatment orders are based largely on clinical decision-making processes and it is difficult for persons with "compulsory" status to effectively challenge such decision-making. While the Act provides for various safeguards, those safeguards are often not respected or effectively implemented, thereby creating a gap between the law and the practice. Persons undergoing compulsory assessment or subject to compulsory treatment orders are often unrepresented, as they do not have sufficient financial means to seek legal advice and the availability of legal aid specifically for persons with disabilities is limited. Section 76 of the Act requires that a review take place no later than three months from the date on which the compulsory treatment order is made and at six-monthly intervals thereafter. However, the Working Group was informed of cases where regular clinical reviews of persons subject to compulsory treatment orders had not been conducted as required under section 76 of the Act.

81. The Working Group met with district inspectors, whose role is akin to that of an ombudsman and whose core functions include providing information to persons with "compulsory" status, checking documentation, conducting visits to and inspections of mental health facilities, and investigating complaints. The independence and accessibility of district inspectors have been raised as issues of concern. While district inspectors are supposed to be detached from mental health services, they are often perceived as not being completely independent from clinical decision-making processes, especially when they have worked in a small community for a long period of time. Also, patients and their family members may not be sufficiently aware of the role and functions of the district inspectors to submit complaints to them.

82. The Mental Health Review Tribunal, which is tasked with determining whether or not persons subject to compulsory treatment orders are fit to be released from that status, has also not been perceived as an impartial, accessible and effective venue for challenging the legality of detention that is based on compulsory treatment orders. The hearings of the Tribunal tend to be very brief and to be held at the facility where the person concerned is being treated. In the vast majority of cases, the Tribunal accepts the judgement of the clinician responsible. Between 1 July 2012 and 30 June 2013, there were only 5 cases out of 102 in which the Tribunal declared that persons with "compulsory" status were fit to be released from that status. That represents 5 per cent of the applications. The average success rate based on the data from 2005 and 2009 is around 6 per cent.

83. Despite the existing safeguards in the legislation, the Working Group is concerned that there may be an underestimated number of cases of arbitrary detention of persons with mental illness. In a related context, the Working Group notes with concern the widespread practice of seclusion in mental health services. The Government reported that, in 2009, stricter standards on the use of seclusion and restraint had been introduced and that, since then, the number of persons secluded had decreased by 29 per cent.

84. The Mental Health (Compulsory Assessment and Treatment) Act 1992 also applies to the detention of "special patients", who include, among others, defendants found unfit to stand trial or acquitted on account of insanity, and mentally disordered persons who are convicted and sentenced to a term of imprisonment, as set out in the Criminal Procedure (Mentally Impaired Persons) Act 2003. Furthermore, persons with intellectual disabilities who have criminally offended and who pose an undue risk to themselves or to others may also be subject to detention as "special care recipients", pursuant to the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

85. The standard of proof required is the balance of probabilities. Under the Criminal Procedure (Mentally Impaired Persons) Act 2003, the prerequisite for a court to make a finding about a defendant's fitness to stand trial is that, on the balance of probabilities, he or she committed the offence. On that basis, the court may decide that the defendant is unfit to stand trial on the balance of probabilities and may order his or her detention in a hospital or a secure facility, taking into account all the circumstances of the case and the evidence of one or more health assessors as to the necessity of such detention.

86. The Working Group is also concerned about the lack of safeguards in practice for persons with a mental impairment or intellectual disability. At the initial point, where persons with a mental impairment or intellectual disability first come into conflict with the law, they may be questioned by the police without the presence of legal counsel. They often do not benefit from effective legal representation throughout the judicial processes, as they may not have access to legal aid or their legal aid lawyers may not have a comprehensive understanding of their disabilities. Once "special patients" or "special care recipients" are made subject to detention, they could be held in a hospital or a secure facility for a long period of time, beyond the maximum possible term of their sentence in some cases, given the inadequate implementation of the legislative safeguards. The Government pointed out that patients under compulsory treatment orders always have access to district inspectors, who are lawyers responsible for ensuring that patients' rights under the Mental Health Act are upheld.

87. Another area in which protection gaps exist is the detention of older persons in care settings. The Working Group met older persons, some of them suffering from dementia, who were deprived of their liberty in rest homes and secure facilities. Although there is a high level of awareness in New Zealand of the challenges that care of aged persons and persons with dementia involves, there is no legal framework specifically regulating the detention of older persons suffering from dementia or other disabilities that affect their capacity to consent. The Protection of Personal and Property Rights Act 1988 and the Code

of Health and Disability Services Consumers' Rights 1996 are the only pieces of legislation that are loosely relevant in this context.

88. The Protection of Personal and Property Rights Act 1988 provides for procedures to appoint a welfare guardian for those who lack legal capacity and for court scrutiny of decisions made by such guardians. In cases where persons do not have legal capacity and there is no person entitled to consent on their behalf, the Code of Health and Disability Services Consumers' Rights 1996 provides that services may be provided where it is in the best interests of the consumer and where it would be consistent with the informed choice that the consumer would make if he or she were competent, or with the views of other suitable persons who are interested in the welfare of the consumer. It is clear that these laws do not set out sufficiently detailed processes by which persons lacking legal capacity may become subject to detention.

H. Remedies for victims of arbitrary detention

89. Victims of arbitrary detention have the right to legal remedies under the Prisoners' and Victims' Claims Act 2005 and the subsequent amending legislation. The 2005 Act restricts awards of compensation sought by specified human rights or tort claims made by a person under the State's control or supervision. It also provides a simplified process for the making and determining of claims that a prisoner, as a victim, may make for compensation required to be paid in respect of specified human rights or tort claims made by the prisoner. When the 2005 Act was adopted, the Select Committee emphasized that the Act fully complied with international obligations and the Bill of Rights. Legal advice provided by the Crown Law Office confirmed that the bill as drafted was not in breach of either. However the Attorney-General, in his report of 2011 on the 2011 Amendment Bill, which would have prevented any receipt of compensation, concluded that it was inconsistent with the right to an effective remedy for breach of the Bill of Rights and also inconsistent with the country's international obligations, citing the concerns of the Committee against Torture and the Human Rights Committee.

90. In the 2007 case of *Taunoa and Ors v. The Attorney-General and Anor*, the Supreme Court awarded damages for unacceptable prison conditions found to be in breach of the Bill of Rights and international law obligations. The judgements in that case leave certain questions unanswered, including with regard to the level of compensation, where the Working Group agrees with the judgement of Chief Justice Elias when she authoritatively restates and applies international law in favour of upholding the judgement of the Court of Appeal.

91. The Working Group is seriously concerned about the legal advice presented to Parliament about New Zealand's international law obligations. In the Working Group's opinion, the 2005 Act and the subsequent amending legislation extending it are in breach of the country's international law obligations. The right to an effective remedy, as set out not only by the Attorney-General in his 2011 report but also by Chief Justice Elias in the *Taunoa* case, requires a renewed review of the legislation in order to ensure compliance with the right to an effective remedy and the prohibition of retroactivity.

V. Conclusions

92. **The Working Group recognizes that, in general terms, New Zealand has an outstanding human rights record, which nevertheless presents some areas of concern, particularly in regard to children's rights, domestic abuse, and societal problems for Maori and Pacific Islanders. High levels of inequality remain, in the areas of**

education, employment, income and health. The law and the judiciary provide effective means of addressing instances of abuse. The New Zealand Bill of Rights Act 1990 contains provisions against arbitrary deprivation of liberty, retroactive penalties and double jeopardy.

93. The Working Group is concerned at the overrepresentation of Maori and Pacific Islanders in the criminal justice system. The Working Group found indications of bias at all levels of the criminal justice process: the investigative stage, with searches and apprehension; police or court bail; extended custody in remand; all aspects of prosecution and the court process, including sentencing; and the parole process, including the sanctions for breach of parole conditions.

94. The Working Group has observed in its interviews in private with detainees that their rights are respected at the time of their arrest; this includes the right to be informed promptly of the charges brought against them, the presumption of innocence, the right not to be compelled to plead guilty or to testify against themselves, and the right to legal counsel. Due process rights are generally respected.

95. Domestic law permits prison visits by independent human rights observers. Transgender inmates can serve their sentences in a prison for their identified gender. Courts pay for all interpretation and translation services. Prison facilities comply with international standards.

96. The Working Group has particular concerns about the wider availability of preventive detention since the enactment of the Sentencing Act 2002, about extended supervision orders under the Parole Act 2002, about the options for intellectually disabled offenders in the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 and about the Public Safety (Public Protection Orders) Bill.

97. The Working Group notes that the Public Safety (Public Protection Orders) Act seems not to be in compliance with international law. Preventive detention must be justified by compelling reasons, and regular periodic reviews by an independent body must be assured to determine whether the detention continues to be justified. The treatment of prisoners held in preventive detention must be distinct from the treatment of convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society.

98. A notable gap remains in relation to the legislative protection available to children aged 17 years. They are considered to be adults as far as their penal responsibility is concerned, are tried as adults, and if convicted, are sent to adult prisons.

99. New Zealand does not have a mandatory detention policy for asylum seekers, refugees, or immigrants in an irregular situation. Detained asylum claimants and undocumented persons who have been refused entry into the country have a right to habeas corpus to challenge the need for their detention. The Government is using the prison system to detain immigrants in an irregular situation and asylum seekers.

100. The criteria established by the Mental Health (Compulsory Assessment and Treatment) Act 1992 for determining the risk of harm to self or others are not clear. The Act allows medical practitioners a wide margin of discretion to determine whether a person should undergo compulsory treatment. Compulsory assessments and treatment orders are based largely on clinical decision-making processes.

101. The Working Group notes with concern the widespread practice of seclusion in mental health services. Another area in which protection gaps exist is the reclusion of older persons, particularly those suffering from dementia, in secure facilities and rest homes.

102. The Working Group recognizes that the problems described in the present report require cross-cutting and collective action and should mobilize government authorities, representatives of civil society and other stakeholders.

VI. Recommendations

103. The Working Group encourages the Government to ensure that the positive legislative and administrative developments described in the present report are accompanied by effective implementation measures that are in strict compliance with international human rights principles and standards.

104. The Working Group encourages the Government to continue in its efforts to ensure that its institutional and legal framework regarding deprivation of liberty fully conforms to the human rights standards enshrined in international human rights standards and in its legislation.

105. On the basis of its findings, the Working Group makes the following recommendations to the Government:

(a) The Immigration Amendment Act 2013 should always be interpreted so as not to breach New Zealand's international and domestic obligations under the United Nations Convention relating to the Status of Refugees, of 1951;

(b) New Zealand should clearly prohibit the transfer of asylum seekers to detention centres in third countries that do not meet international human rights standards or that have no procedures to promptly assess asylum seekers' claims;

(c) Deprivation of liberty of asylum seekers, refugees, and immigrants in an irregular situation should continue to be used only as a measure of last resort and for the shortest possible time;

(d) The Government should continue its efforts to reduce the reoffending rate through adequate programmes;

(e) The Government should intensify its efforts to tackle the root causes of discrimination against Maori and Pacific Islanders in the criminal justice system, and particularly to reduce the high rates of incarceration among Maori, especially Maori women;

(f) New Zealand should strengthen its efforts to develop a broad range of alternatives measures to detention for children in conflict with the law;

(g) Any child, male or female, should be separate from adults in detention;

(h) The mandate of the New Zealand Human Rights Commission should be extended to receive complaints of human rights violations relating to immigration laws, policies and practices and to report on them;

(i) The Government should continue to extend measures to improve the mental-health care and treatment of people in detention;

(j) Policies should be implemented to encourage and support Maori to enter the legal profession and for the appointment of further Maori judges;

(k) The concept of a "young person" should be redefined for the purposes of the youth justice system as anyone below the age of 18;

(l) The authorities should ensure that no asylum seeker or immigrant in an irregular situation is detained in correctional facilities or other places of detention together with convicted prisoners;

(m) New Zealand should ensure the full implementation of juvenile justice standards and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) as well as the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines);

(n) The Working Group recommends that a review be undertaken of the degree of inconsistencies and systemic bias against Maori at all the different levels of the criminal justice system, including the possible impact of recent legislative reforms.

(o) The Working Group has studied the initiatives and review by the Department of Corrections and the New Zealand Police, particularly the "Turning the Tides" initiative. It recommends that the review take the work of the police further, extending it to other areas of the criminal justice system. The Working Group also considers that the search needs to continue for creative and integrated solutions to the root causes that lead to disproportionate incarceration rates of the Maori population;

(p) The Working Group requests New Zealand to fully comply with the requirements of the Convention on the Rights of the Child and to withdraw its reservations.

Appendix

Detention facilities visited

Wellington

- Central Regional Forensic Mental Health Service

Auckland

- Mt. Eden Corrections Facility
- Auckland Prison
- Auckland Central Police Station
- Mangere Refugee Resettlement Centre
- Auckland Airport immigration facilities
- Middlemore Hospital
- Mason Clinic

New Plymouth

- New Plymouth Remand Centre
- High Court holding cell
- New Plymouth Police Station
- Taranaki Base Hospital

Christchurch

- Christchurch Women's Prison
- Rolleston Prison
- Burnham Military Camp
- Te Puna Wai ō Tuhinapo – Youth Justice Residence

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Report of the Working Group on Arbitrary Detention

Addendum

Follow-up mission to Italy*

Summary

The present report contains the findings and recommendations of the Working Group on Arbitrary Detention, following its visit to Italy from 7 to 9 July 2014. The purpose of this visit was to evaluate the progress made by the Government of Italy with respect to the implementation of recommendations contained in the Working Group's report (A/HRC/10/21/Add.5) following its 2008 visit to Italy. The Working Group expresses its appreciation to the Government for the invitation to conduct follow-up, and highlights that this constitutes a good practice and an example for other States to follow in their cooperation with the United Nations Special Procedures of the Human Rights Council.

The Working Group welcomes the measures, especially legislative reforms, undertaken by the Government to implement its recommendations. It is encouraged by the open and rights-based dialogue in the legislative, executive and judicial branches on the issue of arbitrary detention, and notes that there is a clear realization at different levels of the need for further effort in several areas to prevent arbitrary deprivation of liberty.

Notwithstanding these positive developments, concerns remain with regard to the high number of pretrial detainees and, as a consequence, the problem of overcrowding in the penitentiary system. In addition, there is a need to monitor and remedy the disproportionate application of pretrial detention in the case of foreign nationals and Roma, including minors.

Noting that Italy does not have a general policy of mandatory detention of all

* The summary of the present report is circulated in all official languages. The report itself, which is annexed to the summary, is circulated in the language of submission only.

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asylum seekers and migrants in an irregular situation, as opposed to some other European countries, the Working Group welcomes the recent abolition of migration as an aggravating circumstance in criminal law and steps taken by the Parliament to abrogate the crime of "illegal entry and stay". While noting with appreciation that the maximum duration of administrative detention in "identification and expulsion centres" has recently been decreased from 18 months to 3 months, the Working Group remains concerned about the conditions of detention in those centres. Concerns are also expressed in relation to reports of summary returns of individuals, including in some cases unaccompanied minors and adult asylum seekers, in the context of bilateral readmission agreements, mainly owing to inadequate or non-existing screenings that fail to determine age, or to a failure to inform them of their rights.

The Working Group notes that the special detention regime for mafia offenders under article 41 bis of the Law on the Penitentiary System has not yet been brought into compliance with international human rights requirements. The judicial review of the orders imposing or extending this form of detention would need to be sufficiently strengthened and expedited. With regard to the psychiatric system, the Working Group recommends that the Government prioritize reform proposals to close the judicial psychiatric hospitals and transfer their competence to regional substitutive health-care structures.

The Working Group issues a number of recommendations to the Government and underlines that prompt and sustained action is required by the Government in the next phase to ensure compliance with human rights standards.

Annex

[English only]

Report of the Working Group on Arbitrary Detention on its follow-up visit to Italy (7–9 July 2014)

I. Introduction

1. The Working Group on Arbitrary Detention conducted a follow-up visit to Italy from 7 to 9 July 2014, at the invitation of the Government of Italy. The purpose of the visit was to evaluate the progress made by the Government with respect to the implementation of recommendations contained in the Working Group's report following its visit to Italy from 3 to 14 November 2008 (A/HRC/10/21/Add.5). The Working Group is grateful to the Government for this invitation to conduct a follow-up visit and emphasizes that it constitutes a good practice and an example for other States to follow.

2. During the visit, the Working Group met with various officials from different government agencies, including with the Under-Secretary of State of the Ministry of Foreign Affairs, the Under-Secretary of State and officials of the Ministry of the Interior, officials from the Ministries of Justice and Health and representatives of the Interministerial Committee on Human Rights. The Working Group also had meetings with the First President of the Court of Cassation, representatives of the Constitutional Court, the Chair of the Parliamentarian Committee of Human Rights of the Chamber of Deputies and representatives of the Parliamentarian Senate. The Working Group also met with representatives of United Nations agencies, for example, the International Organization for Migration (IOM), and of civil society organizations. The Working Group further met with the Prefect on the island of Sicily.

3. The Working Group would like to thank the Government for its openness and availability for meetings, and particularly the Interministerial Committee on Human Rights for its support. In Palermo and Trapani on the island of Sicily, the Working Group visited places where persons were deprived of their liberty. The Working Group expresses its gratitude to the Government for allowing the delegation unimpeded access to places of detention and to conduct private and confidential interviews with detainees of its choice, in accordance with the terms of reference for fact-finding missions by special procedures mandate holders.

4. The Working Group shared its preliminary findings with the Government at the close of the follow-up visit. On 17 April 2015, it sent an advance preliminary version of the present report to the Government.

II. Status of the implementation of the recommendations contained in the report on the 2008 visit of the Working Group to Italy (A/HRC/10/21/Add.5)

5. An analysis is presented below of the implementation of the recommendations made in paragraphs 111 to 124 of the report of the Working Group following its visit to Italy from 3 to 14 November 2008.

A. Length of criminal proceedings and excessive recourse to pretrial detention

6. In its 2008 report, the Working Group noted that, although safeguards against illegal detention in the Italian criminal justice system were numerous and robust, situations of arbitrary detention could result from the unreasonable length of criminal proceedings and from excessive recourse to remand detention.

7. In its follow-up replies to the country visit report, the Government informed the Working Group of a number of recent regulatory changes designed to limit the use of remand in custody. Such measures include Act No. 9/2012, adopted with the aim of reducing prison overcrowding; Law-Decree No. 78/2013, as converted into law by Act No. 94/2013, whereby the required limit for the applicability of the precautionary measure of custody in prison was raised from 4 to 5 years; Act No. 199/2010, which introduced a new regulation aimed at enforcing prison sentences in premises other than prison facilities, i.e. the home of the offender or other public or private care centres falling within the definition of residence and abode; and Law-Decree No. 146/2013, which provides for, inter alia, a special early release. Recently, Law No. 47/15 entered in force, by which several amendments into the Criminal Procedure Code and the Penitentiary Act (Law No. 354/1975), the most important of which are the following:

- In case of risk of absconding or recidivism, the precautionary measures can be applied only when the risk is current and concrete; the risk cannot be presumed from the seriousness or the type of the crime
- Pretrial detention can be ordered only when other measures, coercive or precautionary, are not adequate; it is possible to apply both coercive and precautionary measures at the same time
- The judge must not assess whether it is possible to apply alternative measures instead of pretrial detention when the proceeding concerns seditious conspiracy, terroristic conspiracy or mafia conspiracy
- When the judge orders pretrial detention, he must indicate the specific reasons for which house arrest or electronic tag are not to be granted in the case in question
- When the accused breaches house arrest, the judge can order the withdrawal of the house arrest, except in cases of lesser relevance
- Strict rules have been adopted regarding both the pretrial detention motivations and the deadlines for taking a decision by the Court of Review; if such requirements are not respected, the pretrial detention loses effectiveness
- The right of detainees to receive visitors has been extended to seriously handicapped sons or daughters, in addition to sons or daughters whose lives are in danger or who are affected by a serious illness

8. Legislative Decree No. 28/2015, implementing Law No. 67/2014, added article 131 bis to the Criminal Code. This article establishes that the defendant cannot be punished if the maximum penalty for the crime does not exceed five years of imprisonment and the judge considers the committed actions not socially dangerous, because the offense is not serious and the defendant's behaviour is not persistent. The Government pointed out that Law No. 117/2014, which converted Law-Decree No. 92/2014, introduced several exceptions to the general rule of the exclusion of the pretrial detention when the established penalty does not exceed three years of imprisonment. In fact, the judge cannot apply such a general rule when (a) the crimes concerned are domestic violence or stalking; (b) other grave crimes are concerned, as established in article 4 bis of Law No. 354/195; (c) when, according to the advice of the judge, all other precautionary measures are inadequate; and

(d) when there is not an adequate domicile to allow house arrest. The Working Group also notes with interest that a draft law on amendments to the Code of Criminal Procedure relating to appeals to the Court of Cassation (third level of adjudication) was submitted to the Chamber of Deputies in March 2013 in order to ensure the principle of reasonable duration of the criminal proceedings.

9. According to the Government, preventive custody in prison is taken as a measure of last resort (art. 275, para. 3, of the Criminal Procedure Code) under the strict circumstances provided for in art. 273 of the Criminal Procedure Code. Preventive custody in prison can be imposed only as a last resort if there is clear and convincing evidence of a serious offence. However, preventive custody is not permitted for pregnant women, single parents of children under the age of 3, persons over the age of 70 or those who are seriously ill.

10. In the course of its visit, the Working Group was encouraged by the open and rights-based dialogue in the legislative, executive and judicial branches on issues of arbitrary detention. It was also informed of further measures undertaken by the Government to implement its recommendations.

11. Such positive measures include the recent reforms to reduce the length of sentences, overcrowding in the penitentiary establishments and the use of pretrial detention. According to article 8 of Decreto legge 92/2014, pretrial detention cannot be applied in cases where the judge considers that the defendant, if found guilty, would be sentenced to three years or less or given a suspended sentence. The Working Group is of the view that this would reduce the inappropriate use of pretrial detention as a penalty.

12. The Working Group also notes the positive measures in the criminal justice system, including the Constitutional Court's judgement to relax the indiscriminately higher penalties for minor drugs offences, which, followed by recent legislation, have given effect to the requirement of proportionality, as stated in international human rights law. The same applies to the relaxation of the disproportionate penalties for repeat offenders or recidivists.

13. Notwithstanding these positive measures, the Working Group remains concerned with regard to the high number of pretrial detainees. A large number of people are remanded in custody after being charged instead of being released on bail. Figures before the Working Group indicate that pretrial detainees make up approximately 40 per cent of the prison population. In this respect, the Italian authorities indicated that the statistics for "accused prisoners" include those who have already been convicted and whose judgement has not yet become final.

14. As a consequence, prison overcrowding and substandard prison conditions remain major problems in Italy. According to the Ministry of Justice, as at 14 October 2013, there were 64,564 people in prison. Officially, there were 47,599 available places but, in reality, an average of 4,500 of these could not be used owing to the need for repairs.[1] The Working Group notes with concern that Italian prisons are among the most crowded in the European Union, with occupancy close to 140 per cent of capacity.

15. The Working Group also notes with concern the large proportion of foreigners in Italian prisons. These account for 35 per cent of the total, partly owing to the high rate of drug arrests in a country that is a corridor for the narcotics trade. Nearly 40 per cent of convicts in Italy are serving time for drugs offences. The Working Group thus reiterates that there is a need to monitor and remedy the disproportionate application of pretrial detention in the case of foreign nationals and Roma, including minors.

[1] See http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/html/02/audiz2/audizione/2013/10/17/indice_stenografico.0003.html# (website available in Italian only).

16. In January 2013, in the *Torreggiani* judgement, the European Court of Human Rights held that Italy had violated article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, on the prohibition of torture and inhuman or degrading treatment, by subjecting detainees to conditions involving "hardship of an intensity exceeding the unavoidable suffering inherent in detention".[2] The Court found that the hardship was caused by the overcrowding of cells and the lack of sufficient living space, and that overcrowding in Italian prisons amounted to a structural and systemic problem.

17. The Court concluded that the Government must put in place, within one year from the time the judgement became final, an effective domestic remedy or a combination of such remedies capable of affording adequate and sufficient redress in cases of overcrowding in prisons. It did so on 27 May 2013.

18. The authorities have since taken some measures to address the issues raised by the Court. In particular, the adoption of Law 94/2013, which decreases the use of pretrial detention, increases the possibility of a reduced prison term and also increases the options for detainees to carry out public utility work outside prison. The Working Group notes the presentation of a number of bills proposing alternative penalties to detention, as suggested by the Court, and the creation in June 2013 by the Minister of Justice of a commission to advise on overcrowding in prisons. The construction of extra places was reportedly also planned.

19. At its 1193rd meeting, on 6 March 2014, the Committee of Ministers of the Council of Europe, considering the execution of the Torreggiani judgement, expressed concern that the measures the Government was planning would not be adequate and "strongly urged the Italian authorities to take concrete steps to put in place a remedy or combination of remedies with preventive and compensatory effect affording adequate and sufficient redress in respect of Convention violations stemming from overcrowding in Italian prisons by the deadline set", namely, 27 May 2014. With regard to the Torreggiani judgement, the Government pointed out that new remedies, both preventive and compensatory, had been introduced by Italy, as requested by the European Court of Human Rights. Law-Decree No. 146/2013 of December 2013 lays down a new preventive remedy allowing detainees to complain about any violation of their rights to a supervisory judge. This remedy can provide redress for detention in conditions contrary to article 3. For example, the judge has the power to order the transfer of an applicant out of an overcrowded cell. Legal means are now also available to enforce such an order if it is not executed by the penitentiary authorities. Law-Decree No. 92/2014, which came into force on 28 June 2014, establishes a new compensatory remedy. Accordingly, a detainee may apply to a supervisory judge for a reduction of the sentence that remains to be served, namely, 1 day of reduction, for every 10 days spent in detention conditions that did not comply with article 3 of the Convention. Persons already released can apply to the civil courts for pecuniary compensation in the amount of 8 euros for every day spent in detention conditions that did not comply with article 3 of the Convention. The pecuniary compensation remedy applies also to persons who have spent less than 15 days in such conditions or if the sentence to be served is shorter than the period that could be deducted. On 16 September 2014, the Court, taking into consideration the efforts made by the Government to establish preventive and compensatory remedies, delivered two decisions, *Stella v. Italy* and *Rexhepi v. Italy*, in which it indicated that the preventive remedy had appeared "a priori" accessible and had offered reasonable prospects of success. Concerning the compensatory remedy, the European Court found that, in principle, it constituted an appropriate remedy. Subsequent to

[2] *Torreggiani and Others v. Italy* (application No. 43517/09). This was a "pilot-judgement", allowing the court to identify a structural problem underlying the violations and to indicate specific measures or actions to be taken by the respondent state to remedy them.

these two judgements, about 3,500 pending cases on the same prison overcrowding issue were likewise declared not acceptable.

20. According to data published on the website of the Ministry of Justice, the overall number of people detained in prison on 31 August 2014 was 54,252 (791 of whom were serving their sentence on day release). A comparison with the statistical data previously released by the Government shows that the number of detainees is currently decreasing (there were 58,092 detainees as at 30 June 2014), as an effect of the other general measures recently adopted in criminal and penitentiary law.

B. Special detention regime under article 41 bis of the Law on the Penitentiary System

21. The Working Group, in its 2008 report, referred to the declaration of the Government that organized crime of the mafia type, the threat of international terrorism and criminality by irregular migrants were public security emergencies. The Working Group noted that the Government had responded to each of these emergencies by adopting extraordinary measures, some of which carry with them a considerable risk of resulting in arbitrary detention.

22. According to the Government, the relevant legal framework has undergone significant changes since the Working Group's visit, with the adoption of an amendment to Section 41 bis of the Law on the Penitentiary System, commonly referred to as the special detention regime under Section 41 bis. The Law was amended by Act No. 94 of 2009, which strengthened the special detention regime, and new circulars were subsequently issued by the Department of Prison Administration. During the visit, the Working Group was informed that approximately 700 detainees had been subjected to this regime.

23. The Government, in its follow-up response, elaborated on this special detention regime. Procedurally, the provision applying the regime is adopted by the Minister of Justice; it has a duration of four years and can be extended for an additional period of two years. Complaints can be lodged within 20 days from the date of the communication of the provision, and its decision shall be made by the Supervisory Court of Rome. The restrictions of the Section 41 bis regime cannot be modified either by the administrative authority or by the judicial authority, since they are provided by the Penitentiary Law.

24. The Working Group notes with interest the Constitutional Court's decision No. 143 of 17 June 2013, in which it sanctioned the constitutional illegitimacy of the last sentence of article 41 (b), paragraph 2 (d), subparagraph (b), of Act No. 354 of 1975 (Penitentiary Act), as amended by Act No. 94/2009, which provided for limitations to interviews with defence counsels. Therefore, paragraph 2 (d), subparagraph (b) of article 41 (b) currently in force restricts only visits paid by prisoners' family members and cohabitants, and does not restrict interviews with their defence counsels.

25. Following the decision of the Constitutional Court, the Head of the Department of Penitentiary Administration prepared an amendment providing that prisoners' rights shall be clearly acknowledged in order to allow prisoners to have interviews with their defence counsels, even prisoners, without any authorization nor limitation of the number and duration of interviews, without the possibility to check the actual need or the reasons for the interviews and subject to the definition of the practical modalities of carrying out such interviews, including the setting of hours, the choice of premises and the identification of the defence counsel.

26. Notwithstanding this positive development, the Working Group notes with concern that the special detention regime for mafia offenders under article 41 bis of the Law on the

Penitentiary System has not yet been brought in compliance with international human rights requirements. It became clear to the Working Group during its meetings with authorities that the Government had so far not undertaken any measures to sufficiently strengthen and expedite the judicial review of the orders imposing or extending this form of detention. At times, renewal of the orders would appear to be a rubber-stamping exercise and the restrictions are applied for several years at a time.

27. The Working Group emphasizes that a special security regime that entails severe restrictions on prisoners in terms of socialization with other inmates and contact with the outside world may have harmful effects, and even more so when the prisoners concerned are held under such conditions for prolonged periods. Therefore, in order to counteract potentially harmful effects, it is essential that a balance be struck between the legitimate interests of society and the provision of a regime that offers adequate human contact to the prisoners concerned.

28. The Working Group reiterates that any such restrictive measures must be reviewed on a regular basis in order to ensure their compliance with the principles of necessity and proportionality.

C. Detention of asylum seekers and migrants in an irregular situation

29. In its 2008 report, the Working Group noted that the Italian system for administrative detention of migrants and asylum seekers did not result in overall excessive deprivation of liberty. There were, however, weaknesses in the legal basis and procedural safeguards of the system and incongruities that needed to be rectified to avoid arbitrariness.

30. At the outset, the Working Group reiterates that Italy does not have a general policy of mandatory detention of all asylum seekers and migrants in an irregular situation, as opposed to some other European countries.

Legislative framework

31. The Working Group welcomes the recent abolition of migration as an aggravating circumstance in criminal law and the steps taken by the Parliament to abrogate the crime of "illegal entry and stay". Law No. 67 of 28 April 2014 (article 2) was passed by Parliament, requiring the Government to abolish the crime of irregular entry and stay within 18 months. The Working Group would appreciate an update as to the measures undertaken by the Government in this respect.

32. The Working Group notes with concern that the crime of irregular entry and stay remains an administrative offence and that irregular migrants re-entering the country following an expulsion will continue to face criminal sanctions.

33. The Working Group notes that the legal framework governing detention pending deportation has undergone important changes since its 2008 visit. In particular, Law No. 129 of 2 August 2011 increased the maximum period of detention, previously set at 60 days, to six months and the statutory maximum duration, under certain circumstances, to 18 months. Following its visit, the Working Group expressed its serious concern about the length of administrative detention, although it was encouraged by recent legislative initiatives to reduce the maximum period of detention of irregular migrants to 12, or even 6, months. Importantly, the Ruperto Commission report endorsed by the Minister of the Interior in 2013 had proposed that the maximum period of detention be reduced to 12 months.

34. At the end of 2014, the Parliament approved Law No. 161, which mandates the reform of immigration detention, thereby representing a radical change compared with the

previous immigration policy. The Working Group notes that this reform constitutes a new starting point for Italy in its migration policy, but it is also an important model for the whole European Union, where, in recent years, the use of detention for reasons of immigration law enforcement has increased enormously, both in asylum and in removal proceedings.

35. There are two key points of this reform. The most relevant aspect is the reduction in the maximum period of migrants' detention within removal centres, with an additional reduction in the maximum time limit of detention provided for those migrants who have already served sentences in prison. With the new law, the maximum time a foreign national may be detained in an identification and expulsion centre has changed from 18 months to a strict limit of 3 months. This new maximum is reduced to 30 days if the foreign national has already spent three months or more in prison.

36. Moreover, the reform has replaced the system of judicial control on prolonged detention. The law now requires that after the initial 60 days, after the first extended detention period has expired, further time in an identification and expulsion centre has to be supported by concrete facts that demonstrate the probable identification of the foreign national or that continued detention is necessary to arrange his or her return. However, as mentioned above, even in such cases, the maximum period of detention in such a centre cannot be for more than 90 days. This reform insists on a case-by-case evaluation, in compliance with the provisions set by the European Union Returns Directive.

37. The Working Group welcomes this recent reform. According to its jurisprudence, and in accordance with the principle of proportionality, migration-related detention should be used as a last resort and only for the shortest period of time, and alternatives to detention should be sought whenever possible. The Working Group thus urges the Government to take the necessary measures to reduce the length of the detention in the identification and expulsion centres to the period of time strictly necessary for the identification.

Conditions of detention in the identification and expulsion centres

38. Identification and expulsion centres are centres where migrants are sent in order to be fully identified and removed from the territory. If, at the expiration of the detention period in a Centre, the expulsion order cannot be executed, the Police Commissioner must release the foreigner and order them to leave the country within seven days. In the event that the individual does not comply and is apprehended by the police, they may be ordered to pay a fine of between 10,000 and 20,000 euros and can be detained in a new centre and subject to another removal order.

39. Italian law establishes minimum conditions for detention. Legislative Decree 286/1998, article 14.2, provides that detainees in identification and expulsion centres must be kept in a way that guarantees the necessary assistance and full respect of their own dignity. Presidential Decree 394/1999, article 21.2, further provides that detention centres should provide detainees with essential health services, activities for their socialization and freedom of worship. Furthermore, the Ministry of the Interior has developed guidelines that detail all services to be provided and items to be distributed in such centres.

40. The Working Group welcomes these overarching principles as they provide the necessary foundation for minimum conditions of detention in accordance with international law. Nevertheless, the lack of applicable nationwide standards appears to leave a large margin of discretion to centre managers, and the Working Group has received reports of degrading conditions in many identification and expulsion centres.

41. The Working Group visited the detention facility for migrants in Trapani, at the Milo identification and expulsion centre. This facility had previously been visited in 2012 by the Special Rapporteur on the human rights of migrants, who had expressed serious

concerns about the highly militarized design of the recently constructed facility, with its high wired fences and cell-like conditions.[3] The Working Group found that the situation in this particular detention facility had significantly improved, both in terms of overcrowding and general living conditions. Such improvements were to a large extent attributable to the centre manager at the time of the visit.

42. The Working Group notes that, since 1 January 2012, the organizations involved in the so-called "Praesidium VII" project, namely, IOM, the Italian Red Cross, the Office of the United Nations High Commissioner for Refugees and Save the Children, with funding from the Ministry of the Interior and the Department for Civil Liberties and Immigration, have been acting according to their institutional mandates in the main migrant landing areas and government centres, and have been making themselves available for the hosts' needs. Within the framework of the above-mentioned project[4] the Italian Red Cross monitors health assistance standards and carries out, together with the health units operating in the facilities, interventions and/or procedures aimed at improving the health conditions of the inmates.

43. The Working Group found that a significant number of detainees in identification and expulsion centres were foreign nationals who had been convicted of criminal offences and subsequently remanded in these centres for the purposes of deportation after having served a prison term. While noting that the maximum period of administrative detention in the centres has been reduced to 30 days if the foreign national has already spent three months or more in prison, the Working Group nonetheless reiterates its call upon the relevant Italian authorities to take proactive steps to commence the necessary expulsion and deportation procedures prior to the scheduled release from prison, thereby avoiding the transfer of these individuals to identification and expulsion centres.

Summary returns

44. The Working Group notes with particular concern reports of summary returns of individuals, including in some cases unaccompanied minors and adult asylum seekers, in the context of bilateral readmission agreements, mainly due to inadequate or non-existing screenings that fail to determine age or to inform asylum seekers of their rights. Similar concerns were expressed by the Committee on the Rights of the Child in 2011.[5]

45. In addition, both the Council of Europe Commissioner for Human Rights, Nils Muižnieks, in September 2012, and the Special Rapporteur on the rights of migrants, Francois Crépeau, in May 2013, have urged Italy to refrain from summary returns to Greece, citing continuing concerns over the grave deficiencies in the asylum system of Greece.[6] However, the Government pointed out that Italy did not carry out summary returns to Greece. All the operational procedures carried out at borders by Italy had always been implemented on a case-by-case basis. Each migrant was properly identified and all personal details were managed by the authorities in order to monitor each individual case and the related assistance measures.

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[3] See A/HRC/23/46/Add.3, para. 67.

[4] All of the organizations were partners of the Government in the implementation of the project, which aimed to improve the capacity and quality of reception of people potentially in need of international protection.

[5] See CRC/C/ITA/CO/3-4, paras. 63 and 64.

[6] See A/HRC/23/46/Add.3, paras. 50–55. Furthermore, the Special Rapporteur on the rights of migrants analysed the various bilateral cooperation and readmission agreements negotiated by Italy and its neighbours in paras. 43–55 of his report.

46. Italy has abandoned the "push back" practice and is strongly committed to and involved in search-and-rescue activities at sea, very often far beyond its area of responsibilities, ensuring the rescue of migrants and their delivery onto the Italian territory. Law No. 129/2011, translating Directive 2008/115/CE, has introduced a gradual expulsion mechanism on the basis of a systematic case-by-case analysis of the situation of each migrant to be repatriated. As a result, the repatriation of migrants is immediate where there is the risk of absconding or if the migrant in question is particularly dangerous or has submitted an unfounded or fraudulent application for a residence permit. Otherwise, the repatriation is granted to the foreign applicant, by fixing a specific period for voluntary departure from Italy. The Working Group recalls that such summary returns violate the obligations of Italy under national, European and international law to ensure access to a fair asylum procedure and protection against refoulement, as well as the prohibition of expulsion of unaccompanied minors.

Alternatives to detention

47. According to Italian law, unaccompanied children cannot be detained and are to be issued with a residence permit (Decreto Legislativo 286/98, article 19.2.a). Other vulnerable categories of migrants, such as victims of trafficking or asylum applicants, cannot be removed.[7] Other provisions further protect minors and pregnant women and their spouses, or parents of new born babies up to six months old. However, the Working Group notes that certain practical obstacles, including lack of cooperation of countries of origin of irregular migrants, statelessness and difficulties in the identification of persons subject to a removal, are other reasons for which these orders are not able to be carried out.

48. The Working Group emphasizes that children and other vulnerable persons should not be detained pending resolution of their claims. Alternatives to detention should always be given preference. International evidence suggests that humane and cost-effective mechanisms such as community release programmes can be very successful.

D. Detention of persons in health facilities

49. Following its 2008 visit, the Working Group noted that, regarding the deprivation of liberty of persons with mental health problems, the reform of the health-care laws that abolished closed institutions had not been reflected in similar reforms regarding judicial psychiatric hospitals. The system of open-ended "security measures" for persons considered "dangerous" on the basis of mental illness, drug-addiction or other conditions might not contain sufficient safeguards.

50. According to the detailed follow-up response submitted by the Government, the process to overcome the judicial psychiatric hospitals started in 2008 with the Decree of the President of the Council of Ministers, which established the shifting of the responsibility of the penitentiary health-care service to the regions.

51. On 31 March 2015, judicial psychiatric hospitals were closed, in compliance with the deadline established by Law No. 81/2014. Since 1 April 2015, their competence has been transferred to regional health-care structures and the patients are now under the supervision of the community Mental Health Department, which provides an individual care programme. During the follow-up visit, the Working Group also examined these efforts to close the judicial psychiatric hospitals and transfer their competence to regional substitutive health-care structures. The Working Group regrets that the deadline for

[7] See Legislative Decree 286/98, art. 19, para. 1.

implementing the reform of the psychiatric system was postponed twice, but is encouraged by the fact that the most recent legislative initiative provides for an assessment of all individual cases, as well as strict reporting and monitoring requirements with regard to progress made.

E. Other issues

Incidents of police brutality against arrestees

52. As for the incidents of police brutality, the Government has provided follow-up information about a strong normative framework designed in order to ensure provisions adequate to the service performed by the police forces. The police forces are bound to the following duties: diligence, legality, correctness and loyalty. They are also duty-bound to additional specific obligations and prescriptions (See Act No. 121/81), which are reflected in the so-called disciplinary responsibility, along the lines of the military system. The disciplinary responsibility is linked with, and strongly aims at, ensuring the full compliance with the constitutional principles contained in article 97 of the Italian Constitution. Accordingly, the related sanctional system, being based upon the principle of the expeditiousness of the proceeding, is strictly linked to the disciplinary responsibility. Generally, each and every case/incident is duly and promptly investigated. The Bill introducing the specific crime of torture (A.S. n. 10-362-388-395-849-874-B) is under examination at the Italian Senate (second reading) since 21 April 2015. It comprises seven articles:

(a) Article 1, under which the crime of torture is designated as a common crime and will be included in the Criminal Code under article 613-bis;

(b) Article 2, under which some aggravating circumstances, including when this crime is committed by a public official, have been envisaged;

(c) Article 3, under which the incitement to torture is designated as a formal specific crime, when committed by public officials;

(d) Article 4, under which the statute of limitations has been doubled in the event of torture;

(e) Article 5, which provides for the inadmissibility in a penal judgement of the declarations extorted through torture, except when these declarations are to be used against the author of the torture itself;

(f) Article 6, which forbids the expulsion or the rejection of non-European Union citizens when it is deemed that, in their countries of origin, they could be exposed to torture;

(g) Article 7, under which no diplomatic immunity can be claimed for those foreign citizens investigated or condemned in their countries of origin on the account of torture.

53. The Working Group takes note of the information provided but regrets, however, that the Government has not submitted concrete and updated information on measures undertaken to increase police accountability. Information before the Working Group suggests that no such measures have been taken at the systemic level, despite ample evidence of the need for such measures, for example, following the investigations and judicial proceedings surrounding the abuses against demonstrators at the meeting in Genoa of the Group of Eight and numerous cases of deaths in custody and ill-treatment by police. There has reportedly been no progress to make identity badges compulsory for police officers, nor in strengthening and rendering more transparent the internal disciplinary system. There has also been no progress to ensure adequate training in the use of non-

violent and non-lethal methods and when to resort, when strictly necessary and in a legitimate and proportionate manner, to the use of force.

Establishment of a national human rights institution

54. In the context of monitoring places of detention, the Working Group welcomes Italy's ratification in November 2012 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. One important corollary of the ratification of the Optional Protocol will be the establishment of a national preventive mechanism, with the mandate to conduct unannounced visits to detention facilities. The Working Group also welcomes the establishment of the office of National Guarantor of the rights of detainees.

55. The Working Group regrets that Italy has not yet established a national human rights institution, in accordance with the Principles relating to the status of national institutions for the promotion and protection of human rights, despite the Working Group's previous recommendation and despite having accepted recommendations to this effect in the context of the universal periodic review. The Working Group notes that Italy had also committed to establishing such an institution in its voluntary pledge when putting forward its candidature to the Human Rights Council for the period 2011–2014.

56. Noting bills currently before Parliament,[8] the Working Group urges the Government to prioritize the establishment of such an institution with a broad human rights mandate, with an explicit power to make unannounced spot checks in detention facilities and with the necessary human and financial resources for its effective functioning.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

57. Following the ratification of the International Labour Organization Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and Domestic Workers Convention, 2011 (No. 189), Italy accepted to be periodically reviewed with regard to the implementation of these Conventions at the domestic level. While noting that Italy is not yet a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Working Group encourages the Government to proceed with the ratification of this international instrument.

III. Conclusions

58. **The Working Group expresses its appreciation to the Government of Italy for the invitation to conduct follow-up, and highlights that this constitutes a good practice and an example for other States to follow in their cooperation with the special procedures of the Human Rights Council.**

59. **The Working Group welcomes the measures, especially legislative reforms, undertaken by the Government to implement its recommendations. It is encouraged by the open and rights-based dialogue in the legislative, executive and judicial**

[8] Such as A. C. 1004, on the establishment of the national commission for the promotion and protection of human rights, submitted by Khalid Chaouki on 20 May 20 2013, then assigned to the First Committee on Constitutional Affairs on 29 July 2013; A. S.865, on the establishment of the national commission for the promotion and protection of human rights, submitted by Emma Fattorini on 21 June 2013; and A. C 1256, on the establishment of the national commission for the promotion and protection of human rights, submitted by Barbara Pollastrini on 24 June 2013.

branches on issues of arbitrary detention and notes that there is a clear realization at different levels of the need for further effort in several areas to prevent arbitrary deprivation of liberty.

60. Notwithstanding these positive developments, concerns remain with regard to the high number of pretrial detainees and, as a consequence, the problem of overcrowding in the penitentiary system. In addition, there is a need to monitor and remedy the disproportionate application of pretrial detention in the case of foreign nationals and Roma, including minors.

61. Noting that Italy does not have a general policy of mandatory detention of all asylum seekers and migrants in an irregular situation, as opposed to some other European countries, the Working Group welcomes the recent abolition of migration as an aggravating circumstance in criminal law and the steps taken by the Parliament to abrogate the crime of "illegal entry and stay". While noting with appreciation that the maximum duration of administrative detention in the identification and expulsion centres has recently been decreased from 18 months to 3 months, the Working Group remains concerned about the conditions of detention in the centres. Concerns are also expressed in relation to reports of summary returns of individuals, including in some cases unaccompanied minors and adult asylum seekers, in the context of bilateral readmission agreements, mainly due to inadequate or non-existing screening that fail to determine age or to inform them of their rights.

62. The Working Group notes that the special detention regime for mafia offenders under article 41 bis of the Law on the Penitentiary System has not yet been brought in compliance with international human rights requirements. The judicial review of the orders imposing or extending this form of detention would need to be sufficiently strengthened and expedited.

63. With regard to the psychiatric system, the Working Group recommends that the Government prioritize reform proposals to close the judicial psychiatric hospitals and transfer their competence to regional substitutive health-care structures.

64. The Working Group has noted the high degree of compliance with the current draft of the basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, which the Working Group has presented in accordance with Human Rights Council resolution 20/16, and which is declaratory of international law and based on the human rights conventions, customary international law and general principles of international law.

IV. Recommendations

65. The Working Group encourages the Government to ensure that the positive legislative and administrative developments described in the present report are accompanied by effective implementation measures in strict compliance with international human rights principles and standards.

66. On the basis of its findings, the Working Group makes the below recommendations to the Government.

67. The Government should continue to put in place legislative and other measures to decrease the duration of criminal trials, with a view to ensuring better protection of the right to be tried without undue delay.

68. **The authorities should vigorously pursue their endeavours to combat prison overcrowding, including through increased application of non-custodial measures during the period before any imposition of a sentence. The Working Group would like to receive updated information on progress made by the authorities in this area, including disaggregated statistical data.**

69. **Urgent measures should be taken to improve living conditions in penitentiary institutions. In this respect, the Working Group calls on the authorities to comply with its recommendations on overincarceration and the Torreggiani judgement of the European Court of Human Rights.**

70. **The Government should intensify its efforts to tackle the root causes of discrimination in the criminal justice system, particularly to reduce the high rates of incarceration among foreign nationals and Roma.**

71. **The Government should develop a broad range of alternative measures to detention for children in conflict with the law.**

72. **Under article 41 bis of the Law on the Penitentiary System, any restrictive measure must be reviewed on a regular basis in order to ensure compliance with the principles of necessity and proportionality.**

73. **Deprivation of liberty of asylum seekers, refugees and migrants in an irregular situation should only be used as a measure of last resort. The Government should take sustained measures to ensure that these groups of individuals are detained only because they present a danger for themselves or others, or would abscond from future proceedings, always for the shortest time possible, and that non-custodial measures are always considered first as alternatives to detention.**

74. **Where the expulsion of a migrant is ordered by a criminal court, preparations for the deportation should be carried out while the migrant is in prison, to avoid detention in an identification and expulsion centre.**

75. **All detained migrants should have access to proper medical care, interpreters, adequate food and clothes, hygienic conditions, adequate space to move around and access to outdoor exercise.**

76. **Detained migrants should be systematically informed in writing, in a language they understand, of the reason for their detention, its duration, their right to have access to a lawyer, the right to promptly challenge their detention and to seek asylum.**

77. **All migrants deprived of their liberty should be able to promptly contact their family, consular services and a lawyer, which should be free of charge.**

78. **Comprehensive human rights training programmes should be developed for all staff who work in such centres.**

79. **A fairer and simpler system should be established for migrant detainees to be able to challenge expulsion and detention orders.**

80. **All detained persons who claim protection concerns should, without delay, be adequately informed of their right to seek asylum, have access to registration of asylum claims and should be able to communicate with the Office of the United Nations High Commissioner for Refugees, lawyers and civil society organizations.**

81. **In compliance with the European Union "Dublin III" Regulation, asylum seekers can be transferred only to European Union member States, according to the territorial competence of those member States in receiving and processing the asylum claim, as provided by the Regulation. The Government should prohibit the transfer of asylum seekers to detention centres in third countries that do not meet international**

human rights standards or that have no procedures to assess promptly claims for asylum.

82. **The Working Group urges all relevant regional and national authorities to implement the reform of the psychiatric system as a matter of priority and to take all necessary steps to ensure that forensic psychiatric patients throughout Italy are henceforth provided with a therapeutic environment and individualized treatment programme on the basis of a multidisciplinary approach.**

83. **Incidents of police brutality against arrestees should be thoroughly investigated and those responsible held accountable.**

84. **The Government should prioritize the establishment of a national human rights institution with a broad human rights mandate, with an explicit power to make unannounced spot checks in detention facilities and with the necessary human and financial resources for its effective functioning.**

85. **Following the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Law No. 195/2012), article 7 of Law No. 10/2014 has provided for the establishment by the Ministry of Justice of a national authority for the rights of detainees, tasked with monitoring the treatment of individuals deprived of personal freedom and the implementation of alternative measures to detention in conformity with constitutional, legislative and international standards. It will have the power to visit prisons, investigate on detention measures and visit judicial psychiatric hospitals and all institutions, including identification and expulsion centres, that host individuals deprived of personal liberty. It can also adopt specific recommendations. The Working Group considers that a fully independent national preventive mechanism should be established, in accordance with the Optional Protocol, which is mandated to visit all places where persons are deprived of their liberty.**

86. **The Government should ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.**

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Report of the Working Group on Arbitrary Detention

Addendum

Follow-up mission to Germany: comments by the State on the report of the Working Group on Arbitrary Detention*

* Reproduced as received.

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Comments of Germany on the report of the Working Group on Arbitrary Detention on its visit to Germany (12–14 November 2014)

1. The Federal Government wishes to thank the Working Group on Arbitrary Detention for the opportunity to comment on the Report on its visit.

2. At the outset, the Federal Government wishes to observe that it had been agreed between the Working Group and the Government that the official discussions during the visit should, due to the short notice of the visit, focus on the question of preventive detention and the reforms in this area since 2011. All information about other areas of law contained in the Report are therefore based on information received by the Working Group from other sources and do not represent the outcome of any substantive discussions with the Federal Government.

3. Many of the observations made in the report reiterate the observations made by the Working Group on the occasion of its visit in 2011 rather than containing new information.

4. As far as the Federal Government is aware, there are no figures to support the Working Group's presumption that there is a disproportionate application of pre-trial detention with regard to foreign nationals and Roma. Nor has there been any systematic evaluation of this question by the Working Group. The Federal Government therefore does not share the conclusion made in para 11.

5. The Federal Government considers the statements made in para 25 and 26 as at least incomplete since they are based on the former legislation and do not take the amendments made sufficiently into account. As properly mentioned in the conclusions para 68, normative and practical changes have been made to address the concerns with regard to international law. After these changes, there remain – restrictive – possibilities to extend detention on preventive grounds after the completion of penalties which have been considered as compatible with the European Convention on Human Rights by the European Court of Human Rights, including preventive detention as regulated by the judgment of the Federal Constitutional Court or reserved preventive detention (see M v. Germany, decision of 10 February 2015, Application No. 264/13). For clarification it appears therefore necessary to extend the findings made in para 25 and 26 and insert the following conclusion as termed in para 68: "These concerns have been addressed by legislation and the corresponding changes in the detention regime".

6. The Federal Government finds no basis in fact for the allegations in para 31 that Germany made "wide use of prisons" for pre-removal detainees and in para 33 that offences under Section 95 (1) of the Residence Act were subject to "harsh sentencing". As far as the Government is aware, proceedings for such offences are in practice either discontinued or they end with only mild sentences.

7. Para 35 seems to be somewhat misleading. Under German law, detention prior to deportation may only be ordered to secure the actual execution of the deportation order. This is only possible if identity and nationality of the person to be deported have been established. German law does therefore not provide for detention in order to establish the identity of a foreign national.

8. Recommendation g) (after para 35) is also unclear. Foreigners undergoing an asylum procedure in Germany are under no circumstances forced to return to their country of origin, i.e. the potential country of persecution. Perhaps this misrepresentation stems from the fact that the report in many instances uses the term "asylum seekers" in the meaning of rejected asylum seekers, i.e. persons required to leave the country. This should be clarified.

9. With regard to para 36, the Federal Government wishes to note that the situation of particularly vulnerable groups is already taken into account when deciding upon pre-deportation detention. Detention of minors occurs extremely rarely in practice and – like any detention under German law - by order of a judge only..

10. Para 37 seems to imply that there is no right to court review with regard to deportation orders. This is not the case; German law does provide for the right to court review of deportation orders. We would like to see this rectified.

11. The statement in para 43 that several thousand asylum seekers (maybe the report means asylum seekers whose application has been finally rejected and who are enforceably required to leave the country) are sent to "Länder detention facilities immediately upon arrival" is simply wrong in fact and should be deleted.

12. With regard to detention prior to deportation, the Law on Residence and the related General Administrative Rules already provide for alternative measures. Authorities are required to examine whether less severe means are sufficient, which is also mentioned in Section 62 (1) of the Residence Act, for example. The same holds true for the recommendation in para 35 to reduce the length of detention to the period of time strictly necessary. This, too, is required according to Section 62 (1), second sentence, of the Residence Act. The use of detention as ultima ratio follows already from the principle of proportionality which stems directly from the constitution. It is particularly unfortunate that the draft report does not sufficiently recognize this constitutional dimension of the principle of proportionality in German law.